

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

AMERICAN AIRLINES, INC.,

*Plaintiff,*

v.

SKIPLAGGED, INC.,

*Defendant.*

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Civil Action No. 4:23-cv-00860-P

**APPENDIX IN SUPPORT OF DEFENDANT SKIPLAGGED, INC.'S  
RESPONSE IN OPPOSITION TO PLAINTIFF AMERICAN  
AIRLINES, INC.'S MOTION TO EXCLUDE EXPERT OPINIONS  
AND TESTIMONY OF GEORGE JOHN, PhD AND BRIEF IN SUPPORT**

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on September 3, 2024, a true and correct copy of the foregoing  
was served via the Court's ECF system upon all counsel of record as indicated:

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/s/William L. Kirkman  
William L. Kirkman

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

AMERICAN AIRLINES, INC.,

*Plaintiff,*

v.

SKIPLAGGED, INC.,

*Defendant.*

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Civil Action No. 4:23-cv-00860-P

**AFFIDAVIT OF PRESTON B. SAWYER**

STATE OF TEXAS

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COUNTY OF TARRANT

**BEFORE ME**, the undersigned authority, on this day personally appeared Preston B. Sawyer, who, being first by me duly sworn, on his oath, stated as follows:

1. My name is Preston B. Sawyer. I am over twenty-one years of age and am competent to make this Affidavit. I have personal knowledge of the facts stated herein, which are true and correct.

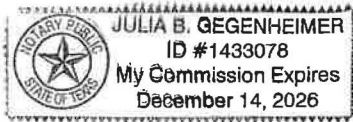
2. I am an attorney of record for Skiplagged, Inc., the Defendant in the above-captioned matter. I make this Affidavit in support of *Defendant Skiplagged, Inc. 's Brief in Opposition to Plaintiff American Airlines, Inc. 's Motion to Exclude Expert Opinions and Testimony of George John, PhD and Brief in Support.*

3. Attached as Exhibit A-1 is a true and correct copy of excerpts from the deposition transcript of George John, PhD, which was taken on July 9, 2024, in the above-captioned matter.

Further, affiant sayeth not.

  
Preston B. Sawyer

**SWORN TO AND SUBSCRIBED BEFORE ME**, the undersigned Notary Public,  
on the 3<sup>rd</sup> day of September, 2024, to certify which witness my hand and seal.



  
Notary Public, State of Texas

# **EXHIBIT A-1**



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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

AMERICAN AIRLINES, INC.,            )  
    Plaintiff,                        )  
                                          )  
                                          )  
V.                                        ) Civil Action No. 4:23-cv-00860-P  
                                          )  
                                          )  
SKIPLAGGED, INC.,                    )  
    Defendant.                        )

\* \* \* \* \*  
ORAL AND VIDEOTAPED DEPOSITION OF GEORGE JOHN, Ph.D.  
\* \* \* \* \*

ORAL AND VIDEOTAPED DEPOSITION OF GEORGE JOHN, PhD, being  
produced as a witness at the instance of the Plaintiff, taken  
in the above-styled and numbered cause on the 9th day of July,  
2024, from 9:37 a.m. to 3:43 p.m., before Rhonda Jacks,  
Certified Shorthand Reporter in and for the State of Texas, by  
machine shorthand, at the offices of Kirkman Law Firm, PLLC,  
201 Main Street, Suite 1160, Fort Worth, Texas, in accordance  
with the Federal Rules of Civil Procedure and the agreements  
hereinafter set forth:

1 A P P E A R A N C E S

2 APPEARING ON BEHALF OF THE PLAINTIFF:

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11 APPEARING ON BEHALF OF THE DEFENDANT:

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16

17 Also present:

18 Don Harris - Videographer

19 Maddie Gerrald - summer intern

20

21

22

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24

25

## I N D E X

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## EXHIBITS

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1 (Deposition commenced at 9:37 a.m.)

2 THE VIDEOGRAPHER: On the record at 9:37 a.m.

3 My name is Don Harris representing Veritext. The date is  
4 June -- July 9th, 2024. Please note that the microphones are  
5 sensitive and may pick up whispering and private conversations.  
6 Please mute your phones at this time. Audio and video  
7 recording will continue to take place unless all parties agree  
8 to go off the record. This is the video recorded deposition of  
9 George John, Ph.D. taken by counsel for the Plaintiff in the  
10 matter of American Airlines, Inc. and Skiplagged, Inc. filed in  
11 the United States District for the Northern District of Texas,  
12 Fort Worth Division, Case Number 4:23-CV-00860-P. The  
13 location of this deposition is Kirkman Law Firm in Fort Worth,  
14 Texas. Attorneys, please state your appearances.

15 MS. PALNITKAR: Bina Palnitkar of Greenberg  
16 Traurig for the Plaintiff.

17 MS. GERRALD: Maddie Gerrald of Greenberg  
18 Traurig for the Plaintiff.

19 MS. PALNITKAR: Maddie is a summer law clerk,  
20 not an attorney.

21 MR. KIRKMAN: I am Bill Kirkman. I am here in  
22 person on behalf of Skiplagged.

23 THE REPORTER: Any attorneys on-line make an  
24 appearance.

25 MR. NELSON: Cameron Nelson from Greenberg

Page 4

1 Traurig on behalf of American, and with me is Jeremy Ballew,  
2 counsel for American.

3 THE REPORTER: Mr. John, will you raise your  
4 right hand. Do you swear to tell the truth, the whole truth  
5 and nothing but the truth so help you God?

6 MR. JOHN: I do.

7 THE REPORTER: Okay. Thank you.

8 GEORGE JOHN, PhD,  
9 having being first duly sworn, testified as follows:

10 EXAMINATION

11 BY MS. PALNITKAR:

12 Q Hello and good morning.

13 A Good morning.

14 Q Will you please state your name for the record?

15 A George John.

16 Q May I call you Dr. George?

17 A John is the last name.

18 Q Oh, sorry. Dr. John. Thank you. What is your  
19 occupation?

20 A I am a professor of marketing at the University of  
21 Minnesota.

22 Q And how long have you been there?

23 A Let's see. I started in 1987. So that makes it -- I  
24 can't calculate. 30 -- 30 -- What is that? 37 years.

25 Q Okay. Have you ever been deposed before?

1           Q     Okay. And what documents did you review in order to  
2     prepare this report?

3           A     Basically my general knowledge and research and  
4     things that I have already done, plus the Jerry Wind report  
5     which is very long. So I stuck to the -- the main body of the  
6     report, not the incredible number of attachments to it.

7           Q     So you reviewed the body of Jerry Wind's report, but  
8     not the appendices. Correct?

9           A     Skimmed them. Didn't really look at it to develop my  
10    report. I just relied on what he is reporting in the body of  
11    the report.

12          Q     Okay. So you didn't go and review the lengthy data  
13    that he cites to in the report?

14          A     I -- Some of these exhibits come from those -- those  
15    documents.

16          Q     Right.

17          A     So yes, I know what's in those exhibits, and I would  
18    go back to make sure I understood what he is saying in an  
19    exhibit, but that's what I did. I didn't go through the set of  
20    attachments page by page if that's what you're asking me.

21          Q     Could you give me an example of some of the lengthier  
22    materials that you did not go through?

23          A     I don't know what I did not go through. What I did  
24    was I started with the report, and if I was unsure about  
25    anything in the report, I would just go make sure that I

1 understood what was going on, and if necessary, I go back to  
2 those attachments, but I didn't do that very many times.

3 Q Okay. Very good. How many times do you think you --  
4 you went to go verify or look at things?

5 A Honestly I can't even remember in depth any  
6 particular instance. It was sufficient for me to look at the  
7 report and see how they -- It was pretty detailed how the  
8 questions are laid out and what the analysis was. So I -- I  
9 really stuck to this -- to this report.

10 Q Okay. So other than your personal knowledge about  
11 various marketing theories, I want to say, and tell me if I am  
12 wrong, and this report, you didn't look at any other documents  
13 to prepare this? And by this report, excuse me, I mean Jerry  
14 Wind's report.

15 A Well, I -- You know, obviously I have to go back and  
16 look at some research materials that I cite in my own report  
17 just to refresh my memory as to what I said in those things.  
18 So the footnotes that I have in my report tell you what I did  
19 look at closely in order to develop it.

20 Q Okay. So if you look at the very last page of your  
21 report which is Exhibit 2 -- You probably don't need that  
22 deposition notice anymore. Do you want to put it up there?  
23 Yeah.

24 THE REPORTER: I have to keep it at the end.

25 THE WITNESS: Oh, sorry.

1 MR. KIRKMAN: It's an important document.

2 THE WITNESS: Yes.

3 Q Please look at the last page. Yes.

4 A Yeah.

5 Q So these are the documents that you have listed that  
6 you reviewed in order to create your expert report. Correct?

7 A Yes.

8 Q And that is the expert report of Jerry Wind that I  
9 think we spoke that it was mainly the body of his report as  
10 opposed to the exhibits. Correct?

11 A That's not true because the body of the report has a  
12 lot of exhibits.

13 Q Uh-huh.

14 A So I did look at those exhibits very carefully.

15 Q You're right. Excuse me. Let me re -- re-ask that  
16 question. I think we spoke that you mainly reviewed the body  
17 of the report as opposed to the appendices that were attached.  
18 Correct?

19 A That's fair.

20 Q Thank you. I am going to start with a little bit of  
21 your background.

22 A Sure.

23 Q You have so many accomplishments that I will go  
24 through that. So let's turn to your CV. It's on page 30. Did  
25 you find it?



1 A I did.

2 Q Very good. So let's talk a little bit about your  
3 education. Where did you get your bachelor's?

4 A At the Indian Institute of Technology in Madras,  
5 India.

6 Q And that was in aeronautical engineering?

7 A Yes.

8 Q Did you -- and I am assuming that's a hard science.  
9 Correct?

10 A Yes.

11 Q IIT is known for the hard sciences. Correct?

12 A Yes.

13 Q All right. And then you came to America.

14 A Yes.

15 Q Is that right? And where did you pursue your  
16 further --

17 A I got an MBA at the University of Illinois.

18 Q And what was the M -- the MBA? Was it just a -- Did  
19 it have a focus is my question?

20 A There was some electives, but we didn't have tracks  
21 if that's what you're asking.

22 Q So this is general business, a master's in just  
23 general business?

24 A Correct.

25 Q And then from there did you take some time to work?

1 A No. I went straight into the Ph.D. program.

2 Q Okay. And I forgot to ask, but between your  
3 bachelor's degree and your MBA did you have any jobs?

4 A No. I went straight to the MBA program.

5 Q Okay. So is it fair to say that until 1981 when you  
6 got your Ph.D. you had not had a typical job? You were kind of  
7 on the education track the whole way?

8 A Yes.

9 Q So when you went to get your Ph.D. you got that from  
10 Northwestern University?

11 A Yes.

12 Q And what was your Ph.D. in?

13 A So it's in marketing as I indicate on the CV. Yeah.

14 Q Thank you. What was your dissertation about?

15 A It was about distribution channels, particularly  
16 about the -- the way oil companies distribute petroleum  
17 products.

18 Q Can you tell me what you were proving or defending in  
19 that thesis?

20 A So basically it's a question of how the oil  
21 companies, particularly Amoco in that instance, dealt with its  
22 franchise dealers, and there are several kinds of dealers, but  
23 I will just use the word dealers, relationships between the  
24 dealers and the oil company on various issues of whether Amoco  
25 is fair to them, how they react, things like that.

1 Q And did you come up with a theory in that  
2 dissertation?

3 A So generally speaking you're looking for empirical  
4 evidence to either support or disprove a theory. And -- and at  
5 that time the -- the big topic of the day was how do you -- how  
6 do you address vertical relationships and antitrust. And one  
7 of those issues there was opportunistic behavior by the more  
8 powerful actors. So that's -- that's essentially what my  
9 dissertation was about and whether in fact it was -- It would  
10 be accurate to say that the powerful actor, in this case the  
11 oil company, essentially could do whatever they wanted to to  
12 dealers.

13 Q So it was -- Is it safe to say it was a test of  
14 monopolistic power?

15 A It was -- So all of Williamson's formulation of  
16 what's called transaction cost economics is a foundational  
17 theory there, yes.

18 Q Okay. Cost economics?

19 A Transaction cost economics.

20 Q Thank you. How did you ascertain your empirical  
21 evidence?

22 A Through surveys.

23 Q Tell me about those.

24 A So the surveys were filled out by the dealers. And I  
25 reached a sample of these dealers and did my initial field work

1 with what are called territory sales managers of Amoco, and  
2 then I pre-tested those survey questionnaires and then sent it  
3 out to them and then analyzed the data.

4 Q Okay. So were -- there was confusion or unfair  
5 competition -- Sorry. Let me take -- strike that. So were you  
6 testing any kinds of confusion within that survey?

7 A There's something very close to that. I was testing  
8 something about opportunism which is close to deception. So --  
9 And in this particular report deception and confusion in the  
10 Wind report are conflated with each other. So it's connected  
11 in that sense.

12 MS. PALNITKAR: I am going to object to that as  
13 being nonresponsive.

14 Q My question here was did you -- did you test for any  
15 confusion within that survey that you sent? I am not asking  
16 how it relates to this report. I'm just asking independently.

17 MR. KIRKMAN: Dr. John, she is entitled to make  
18 objections. It's not necessarily correct, but she is entitled  
19 to make them. So you are obligated to answer a question only  
20 once. If you feel you have answered the question, then simply  
21 tell the lawyer that. Go ahead.

22 Q Let me repeat my question. When you collected your  
23 empirical evidence for your dissertation did you test for  
24 theories relating to a confusion of elements?

25 A So I would like you to define confusion of elements

1 for me.

2 Q Are you testing whether the dealers are confused  
3 about anything?

4 A Yes.

5 Q What was that?

6 A Whether they actually give you reliable data. So  
7 if -- if I ask you a question and you're confused by the  
8 meaning of that question, that's confusion methodologically.  
9 So obviously my pre-test had to ascertain whether or not my  
10 questionnaires were actually confusing to the dealers who were  
11 supposed to answer them.

12 Q So you tested if they were confused about the meaning  
13 of the question?

14 A Methodologically yes.

15 Q Thank you. So after you got your Ph.D. where did you  
16 go?

17 A My first job was at -- Well, let me back up. I did  
18 teach for a year as lecturer at Northwestern in '79 to '80, but  
19 that was before I finished my Ph.D. My first job after my -- I  
20 actually started at the University of Wisconsin before I  
21 finished my Ph.D. also. So in -- in 1981 I finished my Ph.D.,  
22 but I started at Wisconsin in 1980.

23 Q Okay. And then you went on to the Twin Cities.  
24 Correct?

25 A In 1987, yes.

1 Q Okay. And you were -- It says here you were  
2 responsible for the budget, hiring, promotion of the Carlson  
3 School of Management.

4 A Not at that time. I mean I was in charge of the  
5 budget and so on and so forth when I was in the position of  
6 senior associate dean.

7 Q Okay. And you were in the marketing department at  
8 the Carlson School of Management between 2007 to 2015.  
9 Correct?

10 A From 1987 through today.

11 Q Okay. Ah, yes. I see that. Thank you. All right.  
12 What courses do you currently teach?

13 A So I teach the intro marketing class to undergrads in  
14 the honors section. I teach the intro marketing class to  
15 the -- to the executive MBAs. Just last year taught it to the  
16 day MBAs as well. I teach different non-degree classes to --  
17 in the executive program. I have taught channels of  
18 distribution as well, and I teach a Ph.D. seminar on channels  
19 of distribution.

20 Q What is channels of distribution?

21 A So a company produces a product, like American  
22 Airlines produces air travel, and it has to somehow distribute  
23 its product or service. And often times it engages outsiders  
24 or third parties. Sometimes it does some of it by itself. All  
25 of those things are part and parcel of channels of

1 distribution.

2 Q Okay. And the marketing class, this is the main --  
3 main thing you teach I think to the executive MBAs, the day  
4 MBAs and your -- and your undergraduate class. Correct?

5 A I don't know if I would describe it as the main  
6 thing. We -- You have a portfolio of classes. I have to teach  
7 ten credits here. So that -- that menu of ten credits  
8 changes --

9 Q Okay.

10 A -- over time.

11 Q If you had to say the general course description of  
12 some of these classes as it relates to marketing, what -- what  
13 would that entail?

14 A Well, obviously the introductory class covers the  
15 water front. The Ph.D. class covers, you know, highly  
16 technical material closely related to my expertise and  
17 research. I can go into more details, but --

18 Q I will go into your research in a minute.

19 A Okay.

20 Q Thank you for that. It says your research interests  
21 here on page 31 at the bottom is digital channels, sales force  
22 contests, supply networks and technology -- technology  
23 marketing. Is that correct?

24 A Are the current areas.

25 Q Current areas. And what are -- And I think we

1       went -- Well, what are sales force contests?

2           A       It's pretty straight forward. Let's say we are all  
3       sales people and say, hey, whoever sells the most this month is  
4       going to get an award. That's simply put a sales contest.

5           Q       Okay. And supply networks?

6           A       So what's the best example? So think about how this  
7       bottle of water got here. It came out of a spring somewhere,  
8       Ozarka I think. I don't know where that is, but somewhere in  
9       Texas I assume or Arkansas or someplace like that. It -- it  
10      gets processed to the point of extraction. Then it gets  
11      refined somewhere else. And then it gets distributed by some  
12      distributor and finally winds up at HEB or something. And  
13      that's the retailer. And that entire thing would be called a  
14      supply chain.

15          Q       Okay. So supply network is like a supply chain?

16          A       It's -- it's more complicated than a supply chain.  
17      So a supply chain is part of a supply network.

18          Q       Understood. And technology marketing?

19          A       So that's -- For example, we have laptops, but today  
20      I -- I don't know if that gentleman's laptop is actually using  
21      cloud servers or whether he's got all the programs loaded on  
22      locally. So that separation would be an example of technology  
23      marketing. How I would -- how I would market a subscription to  
24      cloud servers for let's say Windows would be different from how  
25      I would sell Windows for that laptop locally.



1 Q Understood. What about digital channels?

2 A So that's ubiquitous today. When you buy something  
3 from Amazon, that's an example of a digital channel.

4 Q So I am engaging in digital channels everyday then.

5 A Pretty much. Yeah. I think it's -- it's a little  
6 bit of a fallacy to think you're only engaging in digital  
7 channels because the person who delivers the product to your  
8 house, that's non-digital.

9 Q Right.

10 A So there's a combination.

11 Q So on-line purchasing perhaps?

12 A The elements that are on-line would be the digital  
13 part of it.

14 Q Okay. When you -- When we spoke about the courses  
15 that you taught or that you teach -- excuse me -- in your  
16 various credits, do you teach distribution channels?

17 A Yes.

18 Q Do you teach the technology marketing?

19 A Yes.

20 Q And you teach supply chain or supply networks?

21 Excuse me.

22 A Both. Supply chains and supply networks is an  
23 extension of it.

24 Q Do you teach any trademark or brand protection survey  
25 sampling?

1           A     There's a lot in that question, so let me see if I  
2     can take it piece by piece. Certain branding is certainly part  
3     of it.

4           Q     No. It was all together. It was trademark survey  
5     sampling. Do you teach that?

6           A     I don't teach trademark survey sampling. There's  
7     nothing unique about trademark survey sampling that would make  
8     it a class. So do we teach elements of it, yes.

9           Q     What elements do you teach?

10          A     I teach branding. I teach sampling. And I certainly  
11     don't teach the legal aspects of trademarks.

12          Q     When you say you teach sampling, could you give me an  
13     example of sampling methodologies?

14          A     Virtually everything -- I would say 90 percent of the  
15     research I have done is empirical. Every empirical study is at  
16     some point how do you get the data, or if you don't get the  
17     data yourself, what's the source of the data, and therefore  
18     what are the properties of that data. And one of the most  
19     important properties is the sampling property.

20          Q     Okay. Do you talk about constructing these surveys?

21          A     If you're asking me if I have ever taught  
22     constructing surveys across all the different classes I have  
23     taught, sure, in some classes, but in other classes not so.

24          Q     What parts of constructing surveys do you -- do you  
25     teach?

1           A     For example, if you go back to what I have taught in  
2     the past and what is covered in my seminar, we talk about  
3     marketing research, how do you collect data. And that includes  
4     surveys. It includes experiments. It includes observational  
5     data. So you would start from A to Z on each of those things.

6           Q     And you are saying these are marketing surveys? I'm  
7     sorry. You said marketing in there. I forgot what you said.

8           A     I forgot also.

9           Q     We were talking about constructing surveys, and you  
10    were saying marketing data --

11          A     Yes.

12          Q     -- I believe. So what do you use -- What kind of --  
13    sorry. When you are using a survey with marketing data,  
14    what -- what kind of evidence do you get from marketing data?  
15    What are some examples of the data?

16          A     I think I collect the surveys to get the data. I  
17    don't have the data to formulate a survey. So, for example, in  
18    the sales force contest we would survey sales people about what  
19    they intend to do or what they have done or how they feel about  
20    the -- the -- the prices they could win, things like that.

21          Q     Uh-huh. Okay. Do you have -- Are there any specific  
22    sampling methodologies that you -- like accepted sampling  
23    methodologies that you teach?

24          A     That's a huge set of issues, and I try to cover them  
25    at the level of the class I teach. So if I am teaching an

1 undergraduate class, I will teach at a much lower level of  
2 sophistication. So there are several issues of sampling on  
3 several types of samples that we would get into in detail if  
4 you're teaching a higher level class.

5 Q Do you teach the standards for likelihood of  
6 confusion sampling?

7 A I'm sorry?

8 Q Do you teach any of the accepted methodologies for  
9 likelihood of confusion sampling?

10 A So I think I am not sure I understand the question.  
11 Sampling is a methodology. Likelihood of confusion is a  
12 conceptual issue. So I am not sure there is a -- a sampling  
13 methodology that is specific to likelihood of confusion as  
14 opposed to sampling methodology per say. So I teach sampling  
15 methodology per say. I don't teach -- In any class we try to  
16 teach things as broadly as possible. So you don't teach how to  
17 answer a particular client's question. When you do projects  
18 you do that. So I am not sure how to answer your question.

19 Q Let me ask a better question then. When you're  
20 constructing a survey to test for likelihood of confusion are  
21 you familiar with the factors that are involved with  
22 constructing that type of survey?

23 A It would depend on the definition of likelihood of  
24 confusion. So there is a general methodology, and I make a  
25 note of that in my report as to how you would develop an

1 instrument and then implement that instrument in a sample to  
2 get at a conceptual subjective concept like likelihood of  
3 confusion or deception of any of these kinds of things. So  
4 yes, I do teach how to develop marketing instrument --  
5 instruments to measure marketing which are mostly subjective  
6 concepts like confusion and like deception, yes.

7 Q Can you tell me about that methodology?

8 A Sure. You first have to define -- I actually say  
9 that in my report. I can go to that and sort of --

10 Q We can go to that. I'm -- I'm looking for the steps  
11 in which you construct a survey for likelihood of confusion.

12 A Certainly. So starting on page 18. So there are  
13 three acceptable elements of developing a measure. We haven't  
14 even got to the sampling yet. So I want to make sure that we  
15 understand each other. So the first thing is you have to  
16 define it, and I go through that on page 18.

17 Q Okay. Show me where you are.

18 A Middle of page 18, there's a Subsection A. There's  
19 no definition of deception or confusion. So the --

20 Q Okay. Is it the first -- the first sentence that  
21 says the accepted practice is to first provide a definition of  
22 the two concepts?

23 A Of any concept or any subjective concept. I apply it  
24 to these two in this case.

25 Q Okay. Where -- where is this -- Where is the

1 accepted practice? What are you referring to?

2 A So I cite footnote five on page 16.

3 Q I wouldn't know that because there's no cite here  
4 that refers to that.

5 A I have it on page 16. I don't know --

6 MR. KIRKMAN: I am not sure what relevance it is  
7 if you wouldn't know. So --

8 MS. PALNITKAR: I am reading his report, and I  
9 don't see the cite for the first sentence of the accepted  
10 practice. There's several citations. I don't know which one  
11 that sentence is referring to.

12 MR. KIRKMAN: He just gave you an answer.

13 MS. PALNITKAR: Right. Objection to your  
14 sidebar.

15 Q Remind me -- Say it again. Which --

16 A On page 16 I give you the foundational citation to  
17 developing a measure. And then I apply that -- that framework  
18 to the Wind report's measures of deception and confusion.

19 Q And this is a -- a foundational study that is a  
20 paradigm for developing better measures of marketing  
21 constructs?

22 A That's right.

23 Q Okay. And that is what you base the accepted  
24 practice on. Correct?

25 A Yes.

1 Q Okay. It says -- The literature provides a  
2 definition of both these concepts. And that literature is  
3 again the footnote five?

4 A I'm -- I'm sorry. What's the question again?

5 Q The second sentence here is the literature provided  
6 definitions of both -- excuse me. The literature provides  
7 definitions of both these concepts.

8 A Which page are you reading?

9 Q The same page 18.

10 A Okay. Hold on a second.

11 Q Sorry about that. Okay. Page 18 under Subsection A  
12 it says -- We just spoke about the accepted practice is to  
13 first provide a definition of the two concepts. Correct?

14 A Yes.

15 Q And that -- You are saying that accepted practice is  
16 what you're quoting in footnote five?

17 A I think we are confusing matters. Footnote five  
18 talks about how to do something. It does not include  
19 definitions of deceptions or any construct. It's a methodology  
20 for developing a measure of any subjective construct, two of  
21 which would be deception and confusion.

22 Q Right. I am asking about the word -- the phrase  
23 accepted practice. I am trying to find out where I can find  
24 this accepted practice. And I am just confirming with you that  
25 that was in footnote five.

1 A That's right.

2 Q Okay. Then I go on to the second sentence that says  
3 the literature provides definitions of both these concepts.  
4 And I am asking if that -- by you referring to literature does  
5 that also refer to footnote five?

6 A No, it doesn't. Just general literature.

7 Q Where can I find that general literature?

8 A I was not asked to provide these definitions, but you  
9 can easily find them. Deception and confusion have been  
10 studied in hundreds of studies.

11 MS. PALNITKAR: Objection; nonresponsive.

12 Q I am not asking about the -- the definitions. I am  
13 asking about the literature.

14 A The literature, I do not cite the definitions of  
15 these concepts. I am pointing out the Wind report does not  
16 provide a definition of the concept.

17 Q Right. And I am just asking you what literature are  
18 you talking about?

19 A Marketing literature.

20 Q That's my question to you.

21 A Thank you.

22 Q So what I am asking what literature are you talking  
23 about, you are just saying general marketing literature?

24 A That's right.

25 Q And that's not cited in this report?



1 A No. So can I add something here?

2 Q No. Just a minute. I have a question.

3 A I want to add to my answer.

4 MR. KIRKMAN: You have the ability to correct or  
5 amend your answer.

6 A So you asked me about literature. I provide an  
7 example of confusion in footnote seven. Okay. That provides  
8 an example of a definition of confusion. All right. That's  
9 one definition.

10 Q I don't see that definition anywhere.

11 A I don't know what else I can say. It's footnote  
12 seven, Barbara Loken, Barsalou and Chris Joiner, Categorization  
13 Theory and Research in Consumer Psychology.

14 Q I understand, but there's -- that's -- You're  
15 quoting -- You're quoting a large document. I don't see a  
16 definition for deception or confusion.

17 A You will find it in it.

18 Q Okay. Do you understand that definitions of  
19 confusion in a legal sense are different than definitions of  
20 confusion in a marketing sense?

21 A It may well be. I wasn't asked to look into that. I  
22 have nothing to say about the legal definitions of anything.

23 Q Right. And when you have certain definitions that  
24 you're referring to here, that may not be the acceptable legal  
25 definition of what the same term is. Correct?

1 Q You haven't seen the definition of what confusion is  
2 in a likelihood of confusion survey?

3 MR. KIRKMAN: Form.

4 A In the legal context?

5 Q Yes.

6 A I have not.

7 Q Okay. Have you reviewed any case law that deals with  
8 likelihood of confusion surveys?

9 A I have read them, but I don't have any strong  
10 opinions about the -- the legal -- legal definitions of any of  
11 these concepts. I am not offering any opinions about it.

12 Q Okay. You are not offering any opinions about the  
13 definition of confusion in a likelihood of confusion survey?

14 MR. KIRKMAN: Form.

15 Q I'm sorry. In a likelihood of confusion analysis.

16 MR. KIRKMAN: Form.

17 A All I am saying here is that I don't see a definition  
18 provided. Are there definitions in the literature? To be  
19 sure.

20 Q Why -- What are you basing your opinion on that a  
21 definition needs to be provided in a survey?

22 A I have already said it. It's the methodology by  
23 which we have -- we develop any measure of any subjective  
24 construct.

25 Q And that is a marketing methodology?

1           A     That is a scientific methodology used in psychology  
2     used in marketing in almost every empirical social science.

3           Q     Is it using any of the legal -- legally accepted  
4     methodologies for likelihood of confusion surveys?

5           A     If you show me an example, I will tell you whether it  
6     does.

7           Q     Are you familiar with the examples that go into  
8     likelihood of confusion survey analysis?

9           A     I don't want to hazard a guess. If you show me an  
10    example, I will tell you whether it fits what I'm thinking.

11          Q     Well, that was not my question. My question is are  
12    you familiar with any of the factors that go into likelihood of  
13    confusion analysis?

14                   MR. KIRKMAN: Excuse me. Form.

15          A     You know, I -- I have seen it. I haven't memorized  
16    them, and I haven't seen them recently. So I don't want to  
17    hazard a guess as to what these definitions are.

18          Q     They are not definitions. They are standards. Have  
19    you seen those?

20                   MR. KIRKMAN: Hey, now wait a minute. Wait a  
21    minute. You are not here to lecture him. Ask a question. He  
22    will answer it.

23          Q     I asked have you seen those?

24                   MR. KIRKMAN: And he answered -- Wait a minute.  
25    He answered that question.

1 Q What have you seen?

2 A I have seen a lot of things. I don't know what  
3 you're asking me what I have seen.

4 Q Have you seen case law on the standards that go into  
5 a likelihood of confusion analysis?

6 A I have seen it in the past, but I don't know --  
7 There's a lot of case law, and I don't know what you're  
8 referring to. So I don't want to say I have seen whatever it  
9 is you think I'm referring to.

10 Q Have you ever seen the seven or eight factors that go  
11 into establishing a likelihood of confusion?

12 MR. KIRKMAN: Form.

13 A I may have seen it. I couldn't tell you whether it's  
14 the one that you have in mind.

15 Q Have you ever seen a likelihood of confusion survey?

16 A I have seen a lot of surveys. I may have seen one,  
17 but I don't know which one you're referring to.

18 Q No. I am just saying in general, a likelihood of  
19 confusion survey.

20 A I have seen a lot of surveys, and I am sure that some  
21 of those surveys measure confusion just like some of those  
22 surveys measure deception. So I've probably seen them. I  
23 don't know which one -- which specific one you're referring to.

24 Q I am not referring to a specific one. I understand  
25 you have seen a lot of surveys, but my question is have you

1 seen a likelihood of confusion survey specifically?

2 A Again, I have seen likelihood of confusion measured  
3 in surveys. I don't know if it's a legal one. I don't know if  
4 it's a -- something else. I don't know the context. I don't  
5 do that kind of research. Excuse me. I don't do that kind of  
6 consulting work. So I don't know what kind of surveys you're  
7 referring to.

8 Q Okay. So if you say you haven't done that kind of  
9 consulting work, is it safe to say you have not conducted a  
10 likelihood of confusion survey in a legal case?

11 MR. KIRKMAN: Form.

12 A I -- I actually have been involved in likelihood of  
13 confusion a long time ago in the 80s, but nothing recently. So  
14 I don't know what the current standards are as to what factors  
15 you're talking about.

16 Q Okay. Have you ever conducted -- I understand you  
17 have seen -- Have you ever conducted a likelihood of confusion  
18 survey in a legal case?

19 A No.

20 Q I am going to show you this. I am going to mark this  
21 as -- as Exhibit 3.

22 (Exhibit 3 was marked for identification.)

23 Q And if you could turn to the part that is  
24 highlighted. This is on page 11.

25 MR. KIRKMAN: I have nothing highlighted on page

1           A     I have no idea what research this is based on. So I  
2     don't have an opinion about it.

3           Q     Okay. This is a legal standard set forth by the  
4     courts in the United States on testing for likelihood of  
5     confusion factors. Are you familiar with that?

6                     MR. KIRKMAN: I am going to object. You are not  
7     here to lecture him and tell him. You're here to ask him  
8     questions.

9           Q     Go ahead.

10          A     What was the question?

11          Q     This is -- This case has a legal standard set forth  
12     for likelihood of confusion factors. Are you familiar with  
13     this standard that is set forth here?

14                     MR. KIRKMAN: Form.

15          A     I have seen these -- these sorts of factors or  
16     indicia or whatever they are called. I am not familiar with  
17     the particular one called digits of confusion, but they look  
18     very similar to the things I have seen before.

19          Q     Okay. Is this the -- the factors that you use when  
20     you are evaluating a likelihood of confusion survey?

21          A     I think I have already said I have not conducted a  
22     likelihood of confusion survey. So I wouldn't have had any  
23     occasion to use or not use these factors.

24          Q     Understood. Let's go through some of your  
25     publications here on your CV. I am looking at page 32.

1 conference proceedings on page 35. Correct?

2 A It's more likely that a conference proceeding which  
3 is a lower level of -- of -- of quality would be -- could  
4 include more consulting type work.

5 Q What do you mean a lower level of quality?

6 A It's not a stringent -- So, for example, these  
7 general publications, the likelihood of getting published in my  
8 discipline is probably about two or three percent. So about  
9 100 papers submitted, two or three get published. Conference  
10 proceedings, probably about 20 percent get in. So it's a lot  
11 less competitive. So you will get a lot more different topics  
12 in it.

13 Q So are you -- I'm sorry. I'm not understanding. So  
14 are you saying that you can put -- It's less likely that you  
15 would put -- you would publish on likelihood of confusion  
16 surveys?

17 A So a likelihood of confusion survey is a very  
18 specific thing. It would not have enough generalizable  
19 scholarly content to merit publishing in a -- in a top level  
20 journal. So it's more likely to be in a conference proceeding  
21 or a non peer-reviewed proceeding.

22 Q Okay. Do any of these eight conference proceedings  
23 deal with any kind of surveys on likelihood of confusion?

24 A You know, honestly I can't remember. I would have to  
25 go through each one. I can tell you one that does. So if you

1 go to page 17, you can see number seven, Consumer Confusion in  
2 the Marketplace.

3 Q I'm sorry. Page 35?

4 A I'm sorry. Page 37.

5 Q Oh, okay.

6 A Point number -- I mean item number seven. You can  
7 see that's a -- that's a presentation. So I didn't have a  
8 paper on it, but I presented it at a round table program in  
9 consumer confusion. So --

10 Q In 1986?

11 A Yes.

12 Q Is that the last time you presented on consumer  
13 confusion -- sorry -- likelihood of confusion?

14 A So yes and no. I've -- I've -- I've looked at the  
15 literature, but I haven't done my own research on it since  
16 then.

17 Q Okay. So that takes us all the way to page 42 where  
18 it ends that section, correct, of presentations?

19 A I believe so. Let me just double check that.  
20 Presentations, the top of page 42, yes.

21 Q Okay. And then your dissertation committees. So  
22 this is a -- Is this for students who are coming up for their  
23 Ph.D.?

24 A Not coming up. These are the people -- The first  
25 subsection labeled Advisor/Co-Advisor are the people whom I



1 have advised as a chair or as a co-chair.

2 Q Okay. Very good.

3 A They have all graduated.

4 Q And do any of -- I am looking through these 18, and I  
5 don't see any -- And I know you are -- you are just the  
6 advisor. So you are not coming up with the topic because the  
7 Ph.D. candidates are coming up with the topics. Correct?

8 A With my approval.

9 Q Okay.

10 A Yes.

11 Q Understood. And I don't -- As I see this, I don't  
12 think any of these relate to likelihood of confusion or  
13 sampling studies. Correct?

14 A Many of them do. Sampling is -- Again, sampling is  
15 the general methodology. Most of these dissertations involve  
16 primary data that's been collected, and many of them are  
17 collected via surveys. So sampling is involved in the  
18 methodology of many of these dissertations.

19 Q You're right. You're right. I -- I cannot  
20 generalize the two. So sampling is separate from likelihood of  
21 confusion survey construction. So my better question should be  
22 these -- do any of these 18 dissertation committees have -- or  
23 sorry -- these dissertation subjects have to do with likelihood  
24 of confusion surveys?

25 MR. KIRKMAN: Form.

1 A Not the likelihood of confusion survey.

2 Q Okay. And then moving on to the committee members,  
3 what does this mean?

4 A That means I am a member of the committee, but I am  
5 not the -- the primary advisor.

6 Q Okay. And I see these have a lot to do with channels  
7 of distribution, marketing practices and channels. Do any of  
8 these relate to likelihood of confusion surveys?

9 MR. KIRKMAN: Form.

10 A They -- they do, but not confusion -- likelihood of  
11 confusion surveys. For example, just take the first  
12 dissertation, Recognition and Measure of Learning. So what's  
13 fundamental to developing a measure is to make sure that the --  
14 the measure is actually measuring what you want it to measure.  
15 So it's again part of the general methodology. So confusion,  
16 like any other topic, has to be measured in a proper way. So  
17 the proper measurement of many of these things would involve  
18 that same methodology I talked about. Do any of them have a  
19 likelihood of confusion focus, no.

20 Q Okay. So these are relating in some way perhaps to  
21 confusion as a general marketing theory and how it's used in a  
22 marketing construct?

23 A Let me -- let me -- let me repeat what I said.  
24 Confusion, deception are all subjective constructs. Many of  
25 these dissertations, if not all actually, involve subjective

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1     constructs. There's a particular methodology to go out and  
2     measure subjective constructs including deception and including  
3     confusion, including opportunism and many others including  
4     personality traits, all of those things. And -- and these  
5     dissertations have always used accepted methodologies to  
6     measure these subjective constructs. Have any of them used  
7     that particular methodology to measure likelihood of confusion,  
8     no.

9           Q     Are you familiar with the survey methodologies that  
10     the Courts have approved for demonstrating confusion?

11          A     I -- There are many many elements of these surveys.  
12     So I am not sure what you're referring to. If you show me  
13     something that you are interested in, I can happily respond.

14                   MS. PALNITKAR: Well -- Objection;  
15     nonresponsive.

16          Q     My question was are you familiar with the survey --  
17     survey methodologies, the methods of conducting a likelihood of  
18     confusion survey that -- that have been accepted within the  
19     Courts?

20                   MR. KIRKMAN: Now, wait a minute. I object;  
21     form. He's answered the question. Just because you object to  
22     the responsiveness of the answer doesn't mean he didn't  
23     respond. So, Dr. John, if you believe you have responded to  
24     the question, you can simply tell this lawyer that.

25          A     I have lost track of the question.

1 accepted by a court?

2 MR. KIRKMAN: Form.

3 A I think courts make up their own minds. I can tell  
4 you whether I would accept it as a scholar and whether the  
5 scholarly literature would accept it.

6 Q And by that you mean the marketing literature?

7 A Generally social science literature.

8 Q Okay. Would you be able to tell me if a likelihood  
9 of confusion survey methodology would be rejected by a court?

10 MR. KIRKMAN: Form.

11 A Same thing. I would hope that the courts follow the  
12 science. And -- and I can tell you whether it would be  
13 acceptable or rejected by a journal, if I am reviewing it  
14 whether I would accept it or reject it. But it's very hard for  
15 me to speak as to what the Court would reject.

16 Q Thank you for getting through that with me. Sorry it  
17 was not clear. All right. Just to round out your CV here, I  
18 see professional service. You're a board member of several  
19 journals, correct, and a reviewer as well on page 44?

20 A Let me just check that. Yes, but I want to make  
21 clear that those dates are important. I am not claiming that I  
22 am a reviewer currently and everything, so --

23 Q Sure.

24 A Just make sure that --

25 Q Oh, well, thank you for that. And let's look at your

1 testifying history in the last five years if we will. How  
2 many -- Forget the last five years, but just in the last -- In  
3 your career do you recall how many -- approximately how many  
4 times you have testified?

5 A Maybe a dozen times.

6 Q Is that in court?

7 A Very few in court. I would say, for example, none of  
8 these four have reached a trial stage. Probably two or three  
9 times at trial, maybe around that number. No more than that.  
10 I don't know how to include arbitration proceedings and  
11 commission hearing proceedings. So if you throw all of that  
12 in, maybe about four or five times.

13 Q Okay. Thank you. And by the four you were referring  
14 to, you mean the four cases that are listed on page 45.  
15 Correct?

16 A That's right.

17 Q And two to three times at trial, do you recall what  
18 those -- what you were testifying about at those trials?

19 A Yes, very much so. The -- the one that sticks out is  
20 Axciom v. Axiom. I'm going to get the spelling wrong.  
21 A-x-c-i-o-m v. A-x-i-o-m. That was a confusion case about  
22 whether one brand name was being confused with another. That  
23 was a federal case.

24 Q Okay. Did you -- I think you already said you didn't  
25 conduct the survey for it, but -- because you haven't

1 constructed a survey, but did you opine as to the confusion in  
2 that matter?

3 A I did.

4 Q And what were your opinions there?

5 A That's a long time ago. Let me see if I can  
6 reconstruct it.

7 Q When was it, do you remember?

8 A Sometime this millennium --

9 Q Okay.

10 A -- is the best I can tell you.

11 Q Okay. So tell me about that. I'm sorry I  
12 interrupted you.

13 A So it's -- It was quite an interesting case.  
14 Normally consumer confusion cases rest on individual consumers  
15 being confused between Brand A and Brand B. They think that  
16 Brand B came from Brand A. So this case involved a business  
17 setting where they are writing, you know, million dollar  
18 checks. So the question is who would ever be confused at your  
19 million dollar check was going to this company versus this  
20 company. So I was opining about the fact that the way  
21 businesses buy products still allows for this type of confusion  
22 when somebody gets their foot in the door to tell their story  
23 because the customer may have thought it came -- the person  
24 came from the other company. That's the gist of what we are  
25 talking about.

1 firm. Is that correct?

2 A That's right.

3 Q And so this has to do with using information from  
4 Employer A in Employer B?

5 A Generally speaking. There are lots of issues there,  
6 but I was just asked to talk about what was the nature of the  
7 information and -- and so on and so forth, not -- not the other  
8 issues. There are a lot of issues.

9 Q Were there any surveys involved in this case or in  
10 your opinion of this case?

11 A Not in my opinion.

12 Q Number two, Johnson Controls, you're an expert  
13 witness in connection with an IRS issue.

14 A That's right. Yeah.

15 Q Okay. Are there any surveys involved in this case?

16 A Again, not surveys that I conducted, but surveys that  
17 were conducted by other people.

18 Q Are you giving an expert opinion as to the validity  
19 of those surveys?

20 A You know, that matter is still ongoing. I don't know  
21 what my ability is to speak to those things.

22 MR. KIRKMAN: Don't -- don't do that if you feel  
23 uncomfortable.

24 A Yeah. I would rather not get into the details.

25 Q Okay. Well, it's just going on what you have said

1 here. I filed a report that assessed whether JCI's brands were  
2 more appropriately considered as having a finite useful  
3 remaining life. What does that mean?

4 A So this is a hot topic in brands. Do brands last  
5 forever or do brands slowly lose their relevance over time and  
6 depreciate. That's sort of the two sides of that -- that  
7 argument.

8 Q So would that -- It would be fair to say the  
9 longevity of a brand --

10 A Yes.

11 Q -- is similar to what you're talking about?

12 A Longevity is implicitly infinite if you take one  
13 position, and it is finite if you take the other position.

14 Q That's interesting. Number three, Furniture  
15 Dealer.NE Inc. versus Amazon. It says here that you were an  
16 expert witness for the defendant.

17 A Yes.

18 Q And filed a report about influences and on-line  
19 customer marketing journeys. Is that correct?

20 A That's right.

21 Q You assess the impact of product information elements  
22 on a consumer's propensity to purchase. Is that correct?

23 A Yes.

24 Q What is a consumer journey?

25 A I actually describe it in my report for this case as



1 well. So let's say you are going to buy an airline ticket.  
2 So, you know, your first -- the first stage is, hey, I need to  
3 travel. And there may be a variety of reasons why that is.  
4 Then I go to the next step. And there are five or six steps  
5 that I detail. I can go through each one or --

6 Q We will go through it in your report when we get to  
7 your report.

8 A Okay. So --

9 Q No. I am just asking in general what is a consumer  
10 journey?

11 A It's the steps we go through from initiation of I  
12 need to do something to the final culmination of yes, I  
13 purchased it or I didn't purchase it. It's that -- It's that  
14 series of steps.

15 Q So the -- Is it safe to say it's a -- it's some of  
16 the psychology or what a -- what a customer goes through in  
17 order from inception to actually making the purchase?

18 A Or not making the purchase for one.

19 Q Right. Okay.

20 A A lot of us will drop out. And it's not just  
21 psychology. It's just -- It applies to businesses. It applies  
22 to consumers. It's just the steps that anybody goes through.

23 Q Uh-huh. And it's all related to the consumer side.  
24 Correct?

25 A It applies to businesses as well. If a business is

1 ticket. The second one is deceiving customers into the price  
2 of a non-hidden city ticket. So there's multiple elements  
3 involved there.

4 Q Okay. And let's go to the third core opinion. Could  
5 you tell me what that is about?

6 A Again --

7 MR. KIRKMAN: Form.

8 A -- Dr. Wind's words are confusion. So Skiplagged  
9 confuses consumers into believing -- and I can read the rest of  
10 the sentence, but if you want me to, I can do that.

11 Q Go ahead.

12 A That Skiplagged is associated with or authorized by  
13 American either as an authorized travel agent for American or  
14 as having some other direct relationship with American.

15 Q Okay. So these are the three core opinions that you  
16 said you reviewed or you focused on when you were creating this  
17 report. Correct?

18 A That's right.

19 Q Okay. Let's go to page two. I think we covered most  
20 of that. Okay. So let's go to page three here. The second  
21 paragraph you say my training, teaching and research includes  
22 the design, development and analysis of surveys. I think we  
23 already established that you have not designed a likelihood of  
24 confusion survey. Correct?

25 MR. KIRKMAN: Form.

1           A     I have designed many surveys. I have not done any  
2     consulting engagements on likelihood of confusion.

3           Q     I believe your testimony also said that you have not  
4     designed a likelihood of confusion survey. Correct?

5           A     That is not quite true because remember, I did a  
6     presentation. I don't have a written document based on that,  
7     but that presentation did involve likelihood of confusion.

8           Q     A survey?

9           A     Yes.

10          Q     That you designed?

11          A     Yes.

12          Q     And you conducted?

13          A     Yeah. I mean I survey and conduct my own things, but  
14     I don't have a document. I want to impress that on -- on you  
15     because that was just a presentation.

16          Q     Okay. So you -- And that was in 1980.

17          A     A long time ago.

18          Q     But since then you have not conducted a likelihood of  
19     confusion survey. Correct?

20          A     That's right.

21          Q     The next paragraph says I have also consulted on many  
22     topics closely related to the issues in this case. Do you  
23     consider the -- the issues in this case to be the three core  
24     opinions we just spoke about?

25          A     I think you view them differently from me. I think

1 of it as deception and confusion. And then the subject matter,  
2 the deception and confusion would be hidden city tickets,  
3 pricing and the relationship to American Airlines.

4 Q Okay. And the last paragraph there just above roman  
5 numeral three says my work on customer journeys and search and  
6 digital channels is closely related to the issues I have been  
7 asked to address on this case. Correct?

8 A Yes.

9 Q How are customer journeys related to determining  
10 whether Skiplagged is affiliated with American Airlines?

11 MR. KIRKMAN: Form.

12 A I am not sure I understand the question. The  
13 customer journey of an American Airlines' customer, is that  
14 what you're asking me?

15 Q Well, you said the issues in this case relate to  
16 those -- relate to deception, confusion and affiliation.  
17 Correct?

18 A I use different words, but yes, that's essentially  
19 the same point, yeah.

20 Q Okay. And so I am asking you just taking that third  
21 prong of the three that you just enumerated, my work on  
22 customer journeys is closely related to the issues I have been  
23 asked to address in this case. So my question to you is how  
24 does a customer journey relate to whether Skiplagged is  
25 affiliated with American Airlines?

1           A     In many many ways. So let's -- let's start from the  
2     beginning. What are digital customer journeys? It's search.  
3     Let's just start there, okay, on-line search. So when I get  
4     the results of an on-line search, that's one step. It's the  
5     first step of the -- the journey, as I said, is need  
6     recognition which is really not relevant here. So the first  
7     meaningful step would be I do a search, and I may choose the  
8     site to go to. I may choose Skiplagged. I may choose American  
9     Airlines. So right there we have a question of where I start  
10    my search. So that's -- that's -- that's the connection to the  
11    issue here because it clearly speaks to deception and  
12    confusion. If I go to Skiplagged and I think I am going to  
13    American Airlines, that's clearly confusion. So there are many  
14    many places where the -- the way somebody searches on-line and  
15    the steps they take are connected to these issues of deception  
16    and -- and confusion. The information I get back is -- is an  
17    opportunity to be deceived or confused. So there's another  
18    connection. And the steps I take after I get the results back  
19    is another place where I get confused -- could be confused and  
20    take a step that I would not have taken had I known something  
21    else. So there are many many connections.

22           Q     Thank you. Is Dr. Wind's survey testing for steps of  
23     the consumer journey?

24                     MR. KIRKMAN: Form.

25           A     Not in the way that I -- I describe in my report why

1     the design of his experiments do not faithfully represent a  
2     realistic picture of the customer journey that an American  
3     Airlines' customer would take.

4           Q     My question to you though is are his -- is his survey  
5     testing for a consumer journey?

6                     MR. KIRKMAN:   Form.

7           Q     Is it testing elements of a consumer journey?

8                     MR. KIRKMAN:   Excuse me.   Form.   Asked and  
9     answered.

10          A     I am not sure how to answer the question because the  
11     issues here, one cannot be deceived or confused without a  
12     customer journey.   So yes, the issues that he's testing are  
13     part and parcel of a customer journey.   You can't have one  
14     without the other.

15          Q     Could you elaborate?

16          A     Okay.   I cannot be deceived if I am not undertaking a  
17     journey.   I cannot be confused if I am not undertaking a  
18     journey.   So you can't -- you can't separate the issues of  
19     deception and confusion from the presence of a customer  
20     journey.   It's -- it's an integral part of the customer  
21     purchase.   And to speak about being -- being confused or being  
22     deceived by another actor only occurs in the context of a  
23     journey.

24          Q     So a customer journey as you have put it before is to  
25     decide if someone is going to -- how they come to a purchase

1 people have booked American Airlines tickets through this time  
2 period via Skiplagged?

3 A My engagement was to respond to the Wind report. And  
4 that's what I did.

5 Q Yeah. But your -- you responded by saying -- by  
6 making a calculation here of 88 Skiplagged complaints over the  
7 entirety of the universe of American Airlines' passengers  
8 whether or not that corresponds to Skiplagged booked  
9 passengers. Correct?

10 MR. KIRKMAN: Form.

11 A I don't make that -- I do not make that conclusion.

12 Q I agree. I agree. I think that --

13 A In this next statement, the next sentence says this  
14 tiny fraction indicates there's not a material issue of  
15 complaints to American Airlines emanating from Skiplagged or  
16 Skiplagged bookings. That's all I say. That it's a very small  
17 number in relation to the total number of people who fly  
18 American Airlines. We can conjecture from that that the number  
19 of people who book through Skiplagged is either very very small  
20 or that the people who book through Skiplagged don't complain,  
21 either one. I make no assertion as to which of those two might  
22 be the possibilities it had.

23 Q Or maybe one more theory in that they booked -- they  
24 complained to Skiplagged directly?

25 A That's your complaint. That's your theory, not

1           A     Middle of that whole second bulleted paragraph, I  
2     said this stage is the central focus of the current case. So  
3     everything here revolves around the actions surrounding the  
4     stages of searching for information on-line, looking at the  
5     results, making inferences about the results, taking the next  
6     step and so on and so forth. So that information search stage  
7     is the -- is the key phase here.

8           Q     Did Dr. Wind's report ask its survey respondents to  
9     search for information?

10          A     The -- He shows them the results of what would have  
11     happened had they searched. It's different from asking someone  
12     to do their own search. In fact, that's my criticism of it.

13          Q     I -- I agree. He did show them the -- He did not ask  
14     them to do the search.

15          A     I am glad you agree with my criticism.

16          Q     I do. I do. Because he is -- Is Dr. Wind testing to  
17     see how a consumer would select certain things in his  
18     experiments?

19          A     So again, back to this question of are you asking me  
20     what he did do, which I respond to in my report, or are you  
21     asking me what he should have done?

22          Q     I am asking you what he did do in his -- You're --  
23     You're opining as to his survey. Correct?

24          A     Yes.

25          Q     I am not asking you what he should have done because



1 Q And have you ever seen a likelihood of confusion  
2 survey where the survey respondents were told to search for a  
3 product?

4 A I have not seen any likelihood of confusion surveys  
5 of late one way or the other.

6 Q Okay. So my question is how is the information stage  
7 relevant to a likelihood of confusion survey?

8 A So I described that here at the bottom of page five  
9 and continuing onto six. So what I tried to say here is that  
10 on-line searches are very different from off-line searches.  
11 And I try to go through in detail as to why that is. I am  
12 happy to expand on that if you wish.

13 Q Is Dr. Wind's experiments -- are his experiments  
14 on-line?

15 A It was executed on-line, but it doesn't reflect an  
16 on-line search.

17 Q Okay. Are they -- Is it -- Are they given static  
18 stimuli to review?

19 A Essentially. Given a sequence of stimuli.

20 Q So they are not completing a customer journey in  
21 order to select the stimuli they will ultimately view?

22 A So the heart of my statement here on page five and  
23 six is that on-line searches are very different from off-line  
24 searches. It's very different from showing you a picture of an  
25 HEB aisle with cereal products and asking you, you know, which

1 Q So is Jerry Wind's experiments -- are they -- are  
2 they concerned with the inferences that you make as a  
3 prospective traveler?

4 A So deception and confusion is all about I believe  
5 something that is inaccurate or I believe something that is --  
6 should be something else, or I shouldn't believe what I see.  
7 All of those are inferences about attributes that I make in an  
8 incorrect manner or in a -- in a confused manner based on the  
9 degree of deception and confusion.

10 Q I am not asking about deception and confusion. I am  
11 just asking are Jerry Wind's experiments concerned with the  
12 inferences that a prospective traveler would make when deciding  
13 whether or not to purchase a ticket?

14 MR. KIRKMAN: Form.

15 A You know, I am not sure because he's presenting data  
16 on responses to open-ended questions. How would you describe  
17 this offer, for example. That's one of his primary questions.  
18 And then he starts coding it. So I don't even know why he asks  
19 that open-ended question. That's -- It's sort of a bizarre  
20 question as far as I am concerned, but it certainly gets to  
21 inferences. What do you -- How would you describe this offer  
22 to somebody. I believe those are his exact words, close to his  
23 exact words. So yes, it's -- it's -- it's all about  
24 inferences, what did the consumer make of the stimulus, and  
25 therefore how did they answer those questions or how did they

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1     respond to that open-ended query.

2           Q     And are you of the belief that open-ended questions  
3     are not acceptable in --

4           A     They are --

5           Q     -- in surveying?

6                     MR. KIRKMAN: Let -- let her finish. Go ahead.

7           A     In an experiment of the type that Jerry is conducting  
8     here, open-ended questions introduce more noise into the  
9     system. So -- And I describe why it introduces more noise.  
10    You have to provide a definition to those coders. Those coders  
11    then have to agree with themselves. And actually none of those  
12    details are provided to us or to me at least. So that's why  
13    generally people prefer not to ask -- generally would prefer to  
14    ask close-ended questions that have been pre-tested so you kind  
15    of know what that person is making of the words you're using.  
16    Here we have to guess what that person is saying and the  
17    meaning of the words that they are using.

18          Q     Okay. I am just going to go through the -- the rest  
19     of these two prongs, and then we will take a break. Is that  
20     all right? Here on the price -- Let's see. The fourth prong,  
21     the purchase stage, this is concerned with the manner in which  
22     a prospective traveler actually purchases the -- the chosen  
23     alternative. Correct?

24          A     That's right.

25          Q     And here you say the Wind report offers no conclusion

1 Q If there are certain elements as to what's  
2 appropriate for a consumer survey to be admissible in court,  
3 would that be something for -- would that be a legal  
4 standard --

5 MR. KIRKMAN: Form.

6 Q -- as you're referencing it?

7 MR. KIRKMAN: Form.

8 A I just don't know what a legal standard is. I think  
9 what you're asking me is that how would I design a survey. And  
10 I think that would depend on -- on the objectives of the  
11 survey. I was not asked to design a survey here. So it's hard  
12 for me to answer that in the abstract. But I would assume that  
13 if somebody told me that the legal standard requires X, I try  
14 my best to make sure that my design meets X.

15 Q Okay. And what specific information do you think  
16 that -- do you think is missing in the stimuli that Dr. Wind  
17 used?

18 A That's a big question. I can go through several  
19 things, but I think one big part of it is that it doesn't  
20 fairly represent or even accurately represent the actual  
21 process of searching for information on-line. And that's the  
22 hallmark of a good research design, that it mirrors the  
23 phenomenon and it -- it represents the phenomenon that you wish  
24 to actually speak to. So if you're -- if you're talking about  
25 how people search for and -- and have feelings and evaluations

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1 for airline tickets, your research design should mirror that.  
2 So that to me is the biggest weakness of this -- this report.

3 Q Is that it didn't show the adventure that the  
4 customer took when coming to its decision?

5 MR. KIRKMAN: Form.

6 A There are many elements, but to summarize it, I would  
7 say on-line searching is a dynamic process. And nowhere in  
8 that design -- the research design of the experiments is there  
9 any sense of a dynamic setting where the customer -- the  
10 subject I should say -- is proceeding through stages.

11 Q But you have never seen a likelihood of confusion  
12 survey where they have an on-line search that is dynamic like  
13 that, have you?

14 A I have seen many -- I have actually taught classes  
15 where my students have to do surveys. I have seen industry  
16 surveys done where they all replicate the process that we are  
17 trying to simulate in the lab. So you have the real world, and  
18 you have the lab. And your lab has to mirror what the real  
19 world is doing. And so yes, I have seen many many surveys. I  
20 wouldn't even call them surveys. Just call them experiments  
21 where you put people through the same series of steps that they  
22 would have done in the real world.

23 MS. PALNITKAR: Objection; nonresponsive. Can  
24 you read back my last question please?

25 THE REPORTER: But you have never seen a

1 likelihood of confusion survey where they have an on-line  
2 search that is dynamic like that, have you?

3 A So I have seen dynamic experiments designed to mirror  
4 on-line searches. Was the objective of that study to study  
5 likelihood of confusion? No, I haven't seen those.

6 Q So we will go through here on page seven. And I  
7 think that is what we are discussing here is that you are  
8 saying -- You talk about the selection process. And then you  
9 say on the middle of page eight the key data used in the Wind  
10 report to arrive at the deception conclusion are the responses  
11 to the set of questions, Q1a in the Wind report, immediately  
12 following the first set of screenshots. Correct?

13 A Yes.

14 Q Do you -- Do you agree with that data used or that  
15 data?

16 MR. KIRKMAN: Let her finish first. Go ahead.

17 Q Let me strike that last question. Do you have any  
18 issue with how that data was ascertained?

19 A I go through that, and yes, I have issues with the  
20 uses to which that -- that -- those responses are -- are used  
21 in the Wind report.

22 Q If someone wanted to control or standardize their  
23 survey, would -- so that everyone looks at the same stimuli,  
24 would you not have to show them screenshots of that material?

25 A What's the -- I would like to know what the purpose

1           A     They all involve screenshots. In fact, screenshots  
2     are nothing but an end point capture of what the person is  
3     seeing at that point in time. My problem with it is that it's  
4     a static screenshot, not screenshots off -- I can take  
5     screenshots as a person goes along. And we don't have that  
6     kind of a dynamic process represented in the design. That's my  
7     problem with it.

8           Q     Do you have any evidence to show that that dynamic  
9     process would alter the results of Dr. Wind's experiments?

10          A     Oh, certainly.

11          Q     Where is that at?

12          A     There's a ton of literature showing that any time you  
13     have a static design you are not going to get the same results  
14     as you faithfully represent the dynamic process of -- of what a  
15     subject is doing. This goes back as far as the mid 80s. An  
16     assessor would be a classic example of putting a person through  
17     the assessor package or -- or procedure is probably the -- the  
18     first well-known approach out there in the literature which  
19     puts people through the sequence of steps they would take. So  
20     it's been there for a long time.

21          Q     Do you cite to any of those sources in this report?

22          A     I do not cite the assessor report, no. It's just a  
23     logical argument that I cite to how people make searches  
24     on-line. It's a dynamic process. It's an easy way to get to  
25     the next step. So it's not well represented by the static

1 response to the response -- by the response to a static  
2 screenshot.

3 Q So -- so that's just a logical way of responding. I  
4 am not sure where the -- the sources lie for that statement  
5 that you just made.

6 MR. KIRKMAN: Form.

7 A So --

8 MR. KIRKMAN: Excuse me. Form.

9 A Yeah. I think -- I think I point out that the goal  
10 of the study is -- So if you look at page seven, Section V-A,  
11 the headline is my conclusion, and then I go into the details.  
12 The design does not resemble the real world customer journeys  
13 occurring at Skiplagged.com. So if we back out, what are we  
14 trying to get at here? We're trying to make some inferences  
15 about confusion and deception that occurs as people buy airline  
16 tickets involving Skiplagged.com. And in order to do that, you  
17 have to recreate in the lab what is happening in the real  
18 world. And the design of the Wind experiment does not  
19 sufficiently recreate or even -- even resemble what people do  
20 in the real world when they buy tickets on-line on American  
21 Airlines or through Skiplagged.com. That's the point I am  
22 making.

23 Q Do you have data or analysis to support your opinions  
24 that it does not resemble it?

25 A Of course.



1 Q Where is that data?

2 A The documents that he shows, the static shots that he  
3 provides. I don't see any sequence of shots that he provides.  
4 So he's done static screenshots and asked people their  
5 opinions. That is not a dynamic design. And that's my basis  
6 for saying that it doesn't resemble the actual journeys people  
7 make. And my source for pointing out how people make on-line  
8 journeys are footnoted in the source that I cite, footnote  
9 three, among other things. If you want to look at the  
10 literature, it's cited in that source.

11 Q Well, footnote three assigns a search cost to  
12 consumers. Correct?

13 A There's a lot more than that.

14 Q But that's part of it. Right?

15 A A small part of it.

16 Q Yeah. And a consumer that searches just on Amazon  
17 would have a lower or a zero search cost. Right?

18 A Among other things. That's not the point of the  
19 paper.

20 Q Well, that's --

21 A I don't know what you want me to --

22 Q That's the footnote you're citing to back up what you  
23 are saying right now, and I am showing how that is --

24 A Let me read the footnote. For more information --

25 Q May I finish my question please?

1 I said there.

2 Q Well, I guess my issue here is I don't know in that  
3 paper that discusses several different things what part of that  
4 paper is backing up your opinion that you have put in your  
5 expert report.

6 A Fair enough. And the answer is that it models a  
7 dynamic process. And the dynamic process is nowhere  
8 implemented in the research and design used by Wind.

9 Q But the parts of your -- Does that talk about  
10 confusion? Does your paper talk about confusion?

11 A I -- I think we have gone over this ground before.  
12 The paper is not about confusion. The paper is about how  
13 on-line searches differ from off-line searches. And this is  
14 trying -- This -- These experiments in the Wind report are  
15 trying to gather inferences about on-line searches. And my  
16 point is that the on-line searches and their characteristics  
17 are nowhere represented properly in the Wind experiments.

18 Q Okay. But do you agree that your paper is about  
19 consumer searching across different websites of retailers?

20 A It's about on-line searching and the dynamics of  
21 on-line searching. That's what it's about.

22 Q Okay. Is it -- So it's not about searching for a  
23 single brand, a single product, is it?

24 A Among other things it is.

25 Q It is? Because when I read it I understood it to be

1 something about the real world.

2 MS. PALNITKAR: No. Objection; nonresponsive.

3 Q I am not asking that. I am asking do you have data  
4 that you have gathered and analyzed that shows that a dynamic  
5 search would have rendered different results than the  
6 experiments that Jerry Wind carried out?

7 A That is exactly what we prove in our paper.

8 Q But I am not asking about the paper because the paper  
9 was written before you started looking at this case. Correct?

10 A Yes.

11 Q So I am not asking about the paper. I am asking  
12 about as it relates to this case do you have data that you  
13 analyzed that shows that a dynamic search of these products  
14 would render a different outcome than the experiments that  
15 Jerry Wind conducted?

16 MR. KIRKMAN: Form.

17 A I do.

18 Q Where is it?

19 A It's in the report. I show you that his exhibits do  
20 not lead to the conclusions that he makes from those exhibits.  
21 That's my analysis. Now if you're asking me did I collect my  
22 own data, no, I was -- I did not do any surveys with respect to  
23 this case.

24 Q And so you have no -- you have no data that you have  
25 collected or analyzed on your own outside of the Wind report

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1 that will show that a dynamic search for any products will  
2 render a different conclusion than what Dr. Wind has  
3 ascertained in his experiments. Correct?

4 A So I want to make sure that I am answering the  
5 question you asked. If you're asking me have I collected any  
6 data of any kind on my own other than looking in the U.S. DOT  
7 statistics, the answer is no.

8 Q Okay. So let's get to -- Let's turn here to your  
9 page eight where you say the Wind experiment design grossly  
10 under-represents the large number of flights returned in the  
11 real world customer journey at Skiplagged.com. Do you see  
12 that?

13 A I do.

14 Q So here am I correct that you are saying the Wind  
15 report shows seven flights, but when you did your search on  
16 your own you -- you looked at 200 flights or you had a return  
17 of 200 flights?

18 A So I would have to look through it carefully whether  
19 those numbers are right, but the gist of it is essentially  
20 correct that the static screenshot that is shown to the  
21 respondents in the experiment grossly understates the large  
22 number of flights that I found in my search.

23 Q And why is that relevant here?

24 A Because my response to a static screenshot is  
25 dependent on the information I see in that screenshot. That

1 means the quality of information. That means the amount of  
2 information and the relevance of the information. And what is  
3 key in the search is the number of alternatives. And here  
4 you're asking me to respond to -- If I were a subject, you're  
5 asking me to respond to a screenshot of a limited number of  
6 flights which is completely different from my response to the  
7 large number of flights. And as long as we are talking about  
8 the differences, let me also point out that when you do your  
9 own search you can reorder those flights any which way you  
10 want. You can reorder them by price. You can reorder them by  
11 number of stops, all kinds of things. You don't have any of  
12 that there. So not only do you have a smaller number, you  
13 don't have the ability to format it the way you want to format  
14 it. So those are two big differences.

15 Q Why are you looking at 200 flights which include  
16 Alaska, Delta, Frontier and Spirit when we are searching for  
17 American flights?

18 MR. KIRKMAN: Form.

19 A I did not search for an American flight. I am  
20 searching for a flight for the city pair.

21 THE REPORTER: For the what?

22 THE WITNESS: For the city pair.

23 MR. KIRKMAN: P-a-i-r.

24 THE WITNESS: P-a-i-r.

25 Q Why are you not searching for an American flight?

1 MR. KIRKMAN: Form.

2 A I told you what I did. I searched for a city pair  
3 which are the same city pairs that he searched for in his  
4 design.

5 Q But you understand that this is a lawsuit brought by  
6 American as it relates to American flights. Correct?

7 A I don't know that. I don't know what the basis and  
8 scope of the lawsuit is.

9 Q Okay. Well, I can represent to you that this is in  
10 fact a -- I represent American Airlines. We brought this  
11 lawsuit against Skiplagged as it relates to American Airlines  
12 flights.

13 MR. KIRKMAN: There are other factors involved  
14 than just American flights. So your representation is not  
15 entirely accurate.

16 MS. PALNITKAR: Objection to the sidebar.

17 MR. KIRKMAN: Well, if you're going to make  
18 representations, so am I.

19 MS. PALNITKAR: This has to do with Delta  
20 flights?

21 MR. KIRKMAN: It has to do with all flights.

22 MS. PALNITKAR: All right. I will leave that  
23 there. Objection to all that sidebar as well.

24 Q So is it -- is it reasonable to conduct a survey to  
25 consumers and show a list of 200 flights?

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1 A No.

2 Q Okay. Please tell me how I am wrong.

3 A I am critiquing his study -- his survey because he's  
4 only showing part of the results that would come from a  
5 consumer search. So remember what the stimuli is supposed to  
6 be. Let me read to you his instructions there. Imagine that  
7 you wanted to book a round trip flight from Santa Anna to  
8 Miami, and you decided to use the Skiplagged website to book  
9 flights. Below is the output you received when checking for  
10 available flights. That's my critique. This is not the  
11 output. There's a lot more to it.

12 Q Okay. So it's an under-counting because it doesn't  
13 show the flights across six airlines. Is that part of the  
14 sentence -- this last sentence on page nine?

15 A He doesn't show the results.

16 Q But am I correct that you are saying this is a gross  
17 under-counting of the reality of the 200 plus flights across  
18 six airlines returned in my actual customer journey?

19 A It's -- it's an under-counting based on what I found.  
20 I don't know what he originally found.

21 Q Okay. I am not asking about what he found anymore.  
22 I am asking about what you found.

23 A Okay.

24 Q So you found 200 flights across six airlines.  
25 Correct?

1 A That's right.

2 Q For the city pair. Is that right?

3 A Right. 200 plus. I don't know the exact number.

4 Q Okay. And because you found that volume of flights,  
5 you say that his stimuli is a gross under-counting. Is that  
6 correct?

7 A His stimuli is not a gross under-counting.

8 Q His output.

9 A The representation that that is the output -- Let me  
10 read his words to you. The instruction to the subjects are,  
11 below is the output you received when checking for available  
12 flights. That is simply not represented by this.

13 Q Okay.

14 A That's my problem with it.

15 Q So do you think a likelihood of confusion survey is  
16 about how consumers would make choices amongst different  
17 airlines?

18 A It could be. It doesn't have to be. It could be  
19 confusion about many things. The possibility you cited is one  
20 possible likelihood of confusion survey.

21 Q Is that the survey that you understand Dr. Wind was  
22 trying to run?

23 A What survey?

24 Q A likelihood of conversion -- confusion survey about  
25 how consumers would make a choice amongst different airlines.

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1 minutes after I run the first search -- I assume you have  
2 traveled by air before -- you would not get the same results.  
3 You are going to get a huge variation of results. 15 minutes  
4 after you book the flight the prices are going to be different.  
5 The schedule is going to be different. Airline traffic is so  
6 heterogeneous and so variable. You are not going to get the  
7 same results. But what I am saying is that you're going to get  
8 many more results than the limited number of flights he shows  
9 on this page. That's what I am saying.

10 Q But you don't have data to show that more -- the  
11 viewing of more results will result in a different outcome from  
12 his experiments, do you?

13 A In all likelihood -- Sorry.

14 MR. KIRKMAN: Form. Go ahead.

15 A In all likelihood it would.

16 Q Do you have data to show that?

17 A Yes.

18 Q Besides in all likelihood?

19 A I have data that dynamic searches by customers are  
20 dependent on the information they get. The information they  
21 get here is a truncated set of information. Therefore, the  
22 results are not generalizable to what they actually do in  
23 practice.

24 Q That's great in theory. I understand what you are  
25 saying, but that's not my question. My question is do you have

1 data to show that in this situation an output of -- a viewing  
2 of 200 plus flights across six airlines would create a  
3 different outcome from the experiments that Jerry Wind had? Do  
4 you have that data and that analysis to show them?

5 MR. KIRKMAN: Excuse me. Form. Go ahead.

6 A I don't know -- I have said many times I don't have  
7 any data other than what I show you here. For me it is -- it  
8 is a no brainer that if my choice set is 200 plus airlines  
9 versus my choice set being one, two, three, four, five, six,  
10 seven flights and two airlines, the results are going to be  
11 different.

12 Q But that's to you it's a no brainer.

13 A Yes.

14 Q But there's no evidence to support that no brainer  
15 theory.

16 A There's a lot of academic evidence showing that the  
17 choice set presented to a customer has a profound effect on  
18 their choices.

19 MS. PALNITKAR: Objection; nonresponsive.

20 Q I am talking here do you have data to show that this  
21 viewing of 200 plus flights across six airlines spits out a  
22 different outcome than Jerry Wind's report?

23 MR. KIRKMAN: Form.

24 Q You don't have that data, do you?

25 MR. KIRKMAN: Form.

1 MR. KIRKMAN: Form.

2 A So again, I don't choose the ones I -- I -- I am  
3 going to show. I let the survey -- I let the -- the computer  
4 or the site that I am searching at tell me what my options are.  
5 And that's what I would do. And if the options invariably are  
6 going to include multiple airlines, that's what will happen.

7 Q Okay. So I am going to turn to page 11 of your  
8 report. And if I am correct, you go to an American Airlines  
9 web page at this point in your -- in your experiment. Is that  
10 correct?

11 A I wouldn't call mine as an experiment, but yes, I  
12 went to the AA.com website.

13 Q What should I term this -- this adventure you did?

14 A My -- my little validation of what he's done.

15 Q Okay. In your validation the next step was that you  
16 went to an American Airlines website. Correct?

17 A That's right.

18 Q Okay. And this is what came up. Is that right?

19 A That's right.

20 Q When you searched for Santa Anna to Miami on the same  
21 date, August 3rd, 2024?

22 A It's not the only things that turned up. You can see  
23 I say the corresponding first page is shown below. So that's  
24 just the first page.

25 Q Okay. And in the text below that you write the

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1 Q Okay. So the price at this point in your journey  
2 you're seeing that the price is \$168 for the Skiplagged ticket.  
3 Is that correct?

4 A For a hidden city ticket, yes.

5 Q Yes. Okay. And then you go on to click -- Now I am  
6 on page 12. You go to this screenshot. And you said you  
7 clicked it. You clicked on this book now. Is that correct?

8 A Excuse me. Yes.

9 Q Okay.

10 A So I got to this page when I first selected the  
11 flight.

12 Q Okay.

13 A And then you go to the next page if you click that  
14 book now ticket.

15 Q Okay. Now we are going to page 13. And it looks  
16 like you got this pop-up box on your --

17 A Correct.

18 Q -- on your screen. Correct?

19 A Yes.

20 Q Did you get this pop-up box the first time you went  
21 through this journey when you were trying to book a ticket on  
22 Skiplagged?

23 A So my recollection is that every time you click on a  
24 hidden city ticket you get taken to this page. So to the -- So  
25 once you -- once you click the book now box on a hidden city

1 ticket, you get to this page about important information of  
2 your flight --

3 Q Okay.

4 A -- every single time.

5 Q Do you recall if this is the first or second time  
6 you -- you -- you tried to go down this path?

7 A I tried different city pairs just out of curiosity,  
8 and it always comes up with this -- this box.

9 Q Even the first time you clicked book now this pop-up  
10 box came?

11 A I don't remember the sequence, but in every city  
12 pair, if you click a hidden city ticket, you get this -- this.  
13 And it's more than a pop-up box. It's almost the entire  
14 screen.

15 Q If I told you that when I did it myself, the first  
16 time I went through I did not get a pop-up screen, would that  
17 surprise you or do you have something to --

18 A I don't know. I just don't know what -- how often  
19 they present it. My experience is that they seem to present it  
20 very visibly and make you click through a couple of pages.

21 Q Okay. So again, I don't know when -- what date you  
22 took these screenshots. I haven't seen any dates listed here.

23 A So, as I said, they were taken in May. I believe it  
24 would be May. I thought URL had the -- the -- the date at the  
25 top, but evidently it does not. I can go back and look at

1 Q Do you know when that was changed from the former  
2 pop-up box that appeared?

3 MR. KIRKMAN: Form.

4 A I only know what I see here. I don't know of any  
5 previous pop-up boxes and stuff.

6 Q So if this pop-up box, two steps that you encountered  
7 here was different than the one that was in place during the  
8 time that Wind was conducting his experiments, would that  
9 surprise you?

10 MR. KIRKMAN: Form.

11 A Nothing surprises me about airlines and airline  
12 ticketing. It's like trying to buy fish in a Persian fish  
13 market. But I would be surprised if there were no pop-ups  
14 whatsoever.

15 Q Okay.

16 A So --

17 Q That's good to know. Okay. So then you -- you  
18 clicked it, and then this bad weather and angry airlines. So  
19 what -- what does this pop-up box -- What did you understand  
20 this to mean?

21 A Exactly what they write here. They don't like you to  
22 do this.

23 Q Who doesn't like you to do this?

24 A The airline.

25 Q Do you know why?

1 methodology are you referring to?

2 A I have said this many times before. It's laid out in  
3 footnote five.

4 Q So this is the first time we are talking about this  
5 page, so I haven't asked you this question before.

6 A I meant --

7 MR. KIRKMAN: That is not accurate. You have  
8 talked about this page before. Don't make statements, ma'am.  
9 Just ask questions.

10 MS. PALNITKAR: Objection to the sidebar.

11 Bill --

12 MR. KIRKMAN: I am telling you if you don't stop  
13 making statements, we are going to quit. Ask questions. You  
14 just made a statement that's not true.

15 MS. PALNITKAR: I am asking from -- from  
16 sub-heading B what accepted practice and methodologies are you  
17 referring to. Do you have an objection?

18 MR. KIRKMAN: It wasn't what I objected to. He  
19 answered that question. Then you made a statement that was  
20 incorrect. Now if you have questions, ask them.

21 Q My question is what accepted practice and methodology  
22 are you referring to on page 16 where you say the measurement  
23 of subjective concepts like deception and confusion in the Wind  
24 experiment does not resemble accepted practice and methodology?

25 MR. KIRKMAN: Objection; form. Asked and

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1 answered.

2 A I think I have answered it before. I will repeat it.  
3 It's described in footnote five.

4 Q Okay. And does -- Footnote five is a paradigm for  
5 developing better measures of marketing constructs. Correct?

6 A That's what the title of the paper is, yes.

7 Q What does the paper discuss?

8 A I tell you what the -- the relevance of the paper is  
9 to this case in the next sentence, the three important  
10 elements. And then I describe what they are.

11 Q My question is what does this paper discuss, not the  
12 relevance.

13 A It discusses exactly how to develop a decent measure.

14 Q Of what?

15 A Of a subjective concept.

16 Q In a likelihood of confusion survey?

17 A In any subjective concept.

18 Q Does it cover likelihood of confusion surveys in the  
19 paper? I didn't see it.

20 MR. KIRKMAN: Form. Excuse me. Form.

21 A Confusion is the construct here. So confusion is a  
22 subjective concept. Subjective concepts include personality  
23 traits, attitudes, any of those things, deception, confusion,  
24 opportunism, all of those things. And they're all under this  
25 headline of this foundational study. The -- the applicability



1 of the study is broad and would certainly include confusion.

2 Q But does it include likelihood of confusion surveys  
3 as they are conducted to offer --

4 MR. KIRKMAN: Sorry. Go ahead. Let her  
5 finish.

6 Q -- as they are conducted to offer into evidence into  
7 court?

8 MR. KIRKMAN: Form.

9 A If you show me a likelihood of confusion survey, I  
10 can show you how it follows this procedure. And if it doesn't  
11 follow the procedure, I would think it's a bad survey.

12 Q I did show you one. It's the Wind survey.

13 A Oh, that's not doing it properly, as I said many  
14 times in this study.

15 Q Why not? Why is that lacking accepted practice and  
16 methodology?

17 A Sure. Let's start with the first item. It never  
18 defines the concept.

19 Q Okay. You understand that -- Oh, is there a legal  
20 definition that you have reviewed that is the definition of  
21 confusion or deception?

22 A No.

23 Q Okay. So you're relying on marketing definitions of  
24 deception and confusion?

25 A No.

1 Q What -- Where are you getting your definition of  
2 deception and --

3 A I don't offer a definition.

4 Q But you want Wind to offer a definition?

5 A Yes.

6 Q Do you have the appropriate definition he should have  
7 offered?

8 A No. I -- I would like to see the definition he is  
9 using. The point is anybody who sets out and measures  
10 something should start with a definition. So that's what I am  
11 looking for, and it's not present here.

12 Q Why is a definition important to offer to your survey  
13 respondents?

14 A Because the foundational practice as described in  
15 that paper and done tens of thousands of times since that paper  
16 was published always starts with a definition of a concept.  
17 Without defining a concept we would be going on in circles as  
18 to the meaning of what we are trying to measure.

19 Q If you ask a consumer if they think that Skiplagged  
20 is affiliated with American Airlines and they answer yes, have  
21 you not just witnessed confusion?

22 A No.

23 Q Why not?

24 A Because that's not an acceptable way to measure  
25 confusion.

1           Q     It's not acceptable to ask a consumer if they think  
2     Skiplagged is affiliated with American Airlines and then  
3     understand their response as to indicate whether or not that  
4     respondent was confused?

5           A     I just said that.

6           Q     Sorry?

7           A     I just said that. That would not be a right --  
8     proper way following accepted practice to measure confusion.  
9     That's right.

10          Q     You understand that these questions have been asked  
11     in countless amounts of surveys that have been accepted by the  
12     Court and are deemed acceptable uses?

13                     MR. KIRKMAN: Now, wait a minute.

14          Q     Do you understand that? Do you know that for sure?

15                     MR. KIRKMAN: I am going to object. You're  
16     stating again. Form.

17          A     If you want to show me a survey, I will be happy to  
18     give you my opinion on it. I don't have any generalized  
19     opinions about the quality of surveys done in the litigation in  
20     cases.

21          Q     Okay. Okay. Let's continue. There are three  
22     important elements to developing method -- methodologically  
23     acceptable measures of a subjective construct like deception or  
24     confusion. The concept must be properly defined. Actually let  
25     me strike that question. I am just going to move on. The last

1 sentence of page 16 says I assess whether the Wind report  
2 follows these practice elements. What are you using to assess  
3 whether he is following the elements?

4 A Just my eyes. I can read the report and see there's  
5 a definition. I can see there are multiple questions developed  
6 to create a scale. And I can see if there's any evidence of a  
7 stability. There's none of those three.

8 Q And do you have any data to show that if done another  
9 way stability would result?

10 A I know how you get stability. I know the right way  
11 to do it. I was not asked to do any survey, and I have said  
12 many many times I have not collected any data on my own.

13 Q So you don't know if doing it on your own would have  
14 created a different result, do you?

15 A I do know that.

16 Q Oh, and that's because of the footnote three  
17 literature?

18 A It's because of the generalized notions of how you go  
19 about developing a decent measure of a subjective construct.  
20 And this does not match any of those things on those three  
21 elements.

22 Q And the -- I am going to go back to footnote three.  
23 That's the data that you state generally governs this.  
24 Correct?

25 MR. KIRKMAN: Form.

1 A No.

2 Q On page six?

3 A No.

4 Q Okay. How is that different from your understanding  
5 of how to conduct the subjective construct study?

6 A So the --

7 MR. KIRKMAN: Form.

8 A So footnote three speaks about how people behave  
9 on-line. It's about the dynamic process that you now have to  
10 simulate in your experiment or that you now have to create in  
11 your lab. Footnote five talks about how you go about measuring  
12 a subjective construct.

13 Q Okay.

14 A Let me just double check and make sure it is indeed  
15 footnote five.

16 MR. KIRKMAN: Footnote five is on page 16.

17 A Yes. Thank you. So footnote five is about the  
18 methodology. And footnote three is about dynamic process.  
19 While we are at it, so footnote four actually tells you when I  
20 accessed those flights. It's May 19th, 2024.

21 Q What page is footnote four on?

22 A Page --

23 MR. KIRKMAN: Eight.

24 A Eight. Yeah.

25 Q May 19th, 2024?

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1 A Correct.

2 Q Okay. Thank you. Okay. So footnote three relates  
3 to the on-line dynamic journey. Is that correct?

4 A That's right.

5 Q And footnote five relates to a methodology for  
6 measuring subjective marketing constructs. Is that correct?

7 A Subjective concepts regardless of the field.

8 Q Okay. Subjective concepts. And here in the last  
9 sentence, part B --

10 MR. KIRKMAN: What page are you on?

11 MS. PALNITKAR: 16.

12 Q You say there are three important elements to  
13 developing -- and I have said this already. I'm sorry. Three  
14 important elements to developing methodologically acceptable  
15 measures of a subjective construct like deception or confusion.  
16 A, the concept must be properly defined. We discussed that.

17 A Yes.

18 Q B, based on this definition a scale preferably  
19 comprised of multiple close-ended question statements is  
20 developed. And C, evidence of its stability is reported. So  
21 let's look at B for a moment. Why are -- Why is it a  
22 preference to have closed-ended questions in a likelihood of  
23 confusion survey?

24 MR. KIRKMAN: Form.

25 A It's not confined to likelihood of confusion surveys.

1     first of all. When you're measuring any subjective concept,  
2     open-ended questions as opposed to close-ended questions give  
3     you a lot more instability in originating responses. It is  
4     much less stability with close-ended questions.

5           Q     I understand. But my question is tailored to  
6     likelihood of confusion surveys, and that's what I am asking  
7     about. So it is defined when I am asking my question. I am  
8     asking why is a close-ended question preferable in a likelihood  
9     of confusion survey?

10           MR. KIRKMAN: Form. Asked and answered.

11           A     For the same reasons as I just stated before, because  
12     it will give you more stable answers and less noise in the  
13     system.

14           Q     Have you reviewed any case law when it comes to the  
15     admissibility of open-ended questions in a likelihood of  
16     confusion survey?

17           A     I have not.

18           Q     Let's go through one. I am going to mark number 5.

19                     (Exhibit 5 was marked for identification.)

20           Q     Are you familiar with courts preferring open-ended  
21     questions to likelihood of confusion surveys?

22           MR. KIRKMAN: Form.

23           A     I have no idea what they prefer.

24           Q     So you don't know in a likelihood of confusion survey  
25     if it is preferable to have close-ended or open-ended

1 this. I don't care what you purport to represent to him. I  
2 mean --

3 MS. PALNITKAR: Are you making an objection  
4 right now?

5 MR. KIRKMAN: Yes.

6 MS. PALNITKAR: State it for the record.

7 MR. KIRKMAN: Form. It -- it involves a matter  
8 that has nothing to do with this case. You're asking him to  
9 comment on some judge's statement as to the law --

10 MS. PALNITKAR: Okay. You're --

11 MR. KIRKMAN: -- and admissibility.

12 MS. PALNITKAR: Objection to the sidebar. You  
13 are just now directing your client in how to answer without  
14 making proper objections under the Federal Rules of Evidence.  
15 That's not a proper objection, and you know it.

16 MR. KIRKMAN: If you started by asking a  
17 question that was proper under the Federal Rules of Evidence, I  
18 wouldn't have to make that objection.

19 MS. PALNITKAR: I am about to ask the question.

20 Q Does this -- Does this change your mind on whether  
21 open-ended questions are considered acceptable in a legal  
22 likelihood of confusion survey?

23 MR. KIRKMAN: Form.

24 A So my objection -- My -- my critique of the Wind  
25 report is on several points. If I read what is written here,



1 it looks like the Court is open to close-ended questions, open  
2 to open-ended questions, and that's what I read. It doesn't  
3 change my opinion as to which one offers more reliable evidence  
4 of any subjective concept.

5 Q Right. Not just related -- Your opinion is not just  
6 related to likelihood of confusion surveys. Correct?

7 A That's right.

8 Q Okay. Let's go on. I am going to page 19.

9 A Okay.

10 Q In B you say instead of the preferred close-ended  
11 responses, comma, the Wind report employs open-ended responses,  
12 comma, but there is no systematic procedure reported that was  
13 used to convert the open-ended textual responses into  
14 categories. Just taking the first part of that phrase, the  
15 Wind report employs open-ended responses, do you have -- do you  
16 take issue with the Wind report using open-ended responses?

17 A Exactly as I say, it's preferable to use close-ended  
18 responses, yes.

19 Q And is using open-ended responses something that  
20 makes the survey invalid?

21 MR. KIRKMAN: Form.

22 A Nothing makes a survey invalid or valid in -- in --  
23 by picking out one element. It's the totality of everything we  
24 talked about here. So what I write here is that I would prefer  
25 to use close-ended responses based on the literature. But if

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1     you're going to use open-ended responses, what I -- what is  
2     distressing to me is that there's no systematic procedure  
3     reported that converts the open-ended responses into numerical  
4     categories, countable categories.

5           Q     And where is the data cited that says it is better to  
6     convert open-ended responses into categories?

7           A     He reports counts.

8           Q     What data do you have to make that assertion?

9           A     I am looking at his counts. How does he come up with  
10    those counts? You can't have counts without having converted  
11    text into numbers, categories. So that's what my point is.  
12    That the procedure by which he comes up with those results is  
13    not reported.

14          Q     And that is your observation. Correct?

15          A     That is my observation, yes.

16          Q     And so you are saying that there's no systematic  
17    procedure reported that was used to convert responses into  
18    categories. And that's because you say so?

19                   MR. KIRKMAN: Convert open-ended textual  
20    responses into categories.

21                   MS. PALNITKAR: Agreed. Let me strike that last  
22    question.

23          Q     So you are saying there is no systematic procedure  
24    reported that was used to convert the open-ended textual  
25    responses into categories. And that is a flaw in his --

1           A     One of the many flaws, but I expand on that. On the  
2     bottom of page 19 I tell you what my particular problem with it  
3     is. It says no such coding scheme development procedure is  
4     reported in the Wind report. Instead the brief description  
5     provided in the report on page 26 alludes to the procedure  
6     involving two independent coders, and that's quoting from the  
7     report, who are not familiar with the objective study or  
8     responses and a procedure for resolving conflicts of two  
9     coders. We are not told what the procedure looks like. We are  
10    not told what the degree of agreement is. We are not told how  
11    they resolve the conflicts.

12           Q     Do you have any literature or data that supports that  
13    you must be told the coding scheme for an open-ended question?

14           A     Of course.

15           Q     Where is that?

16           A     In any academic journal you would never get passed  
17    the desk reject setting if you don't tell people what you do.

18           Q     But have you put that citation into this report?

19           A     I don't need to put a citation. That would be true  
20    of any academic. It would also tell you that if you did  
21    something, you took text and you converted it to numbers, you  
22    would have to show me how you did it. And that is not done  
23    here.

24           Q     So there's no cite to --

25           A     It's not a citation. It's a procedure. It's just

1 simply telling you what did you do.

2 Q So that's because -- This is because you say so then.  
3 You -- you are saying that someone needs to write a coding  
4 procedure?

5 MR. KIRKMAN: Form.

6 A I hope my entire report is what I am saying. So yes,  
7 I'm the one saying it.

8 Q Right. Well, I am looking for some kind of outside,  
9 not you literature, that shows that a coding scheme has to be  
10 developed.

11 A And I am telling you that there is no academic person  
12 of any respectability who would tell you that I can go and  
13 convert textual responses into categories without telling you  
14 how he did it.

15 Q Okay. But you don't have any of that external data  
16 here in this report?

17 A That's like asking me if I have two eyes. Do I?

18 Q I don't know. Only you know. One might not work.

19 A That's called inter-subjectivity, but anyway.

20 Q Okay. So you are saying that this is a flaw because  
21 there's no coding scheme reported. Correct?

22 A One of the many flaws.

23 Q And that a coding scheme must be present because in  
24 your expertise it should be present. Correct?

25 A I tell you why in point C.

1 Q But my question is is it because it's in your  
2 expertise that it should be present? Is that correct?

3 A No. It's because you cannot judge the reliability of  
4 a measure without seeing how it was developed. It's as simple  
5 as that.

6 Q I understand, but there's no -- there are citations  
7 in here that refer to where other literature says that. Right  
8 now it's just you saying that. Correct?

9 MR. KIRKMAN: Form. Asked and answered three  
10 times.

11 A I will repeat myself. I am saying it because that --  
12 that would be the position of any academic who develops  
13 measures of subjective concepts.

14 Q But no other academics are listed here. So again, I  
15 am asking is this right now as it is on this paper because you  
16 say so?

17 A You know, this is the equivalent if you ask me if the  
18 earth is flat. Okay. So that's what's going on here. What I  
19 am saying is that this is such a commonly known thing that if  
20 you want to go back into stability of measures, you can go back  
21 to footnote five and see how the procedure works, and that  
22 would tell you why you would want to have evidence of  
23 reliability and how you develop evidence of reliability. So  
24 the details are there, and that's a foundational paper. And I  
25 don't cite to anything else besides that foundational paper.

1 MS. PALNITKAR: Objection; nonresponsive.

2 Q I am asking if the only back-up to your assertion  
3 that a coding scheme must be proffered by Jerry Wind, is the  
4 only back-up to that your opinion as we sit here today?

5 MR. KIRKMAN: That's the fifth time you've asked  
6 that. Don't answer that question.

7 MS. PALNITKAR: He hasn't answered.

8 MR. KIRKMAN: I have had it. You have asked  
9 that five times, ma'am. And he's given you five times answers.

10 MS. PALNITKAR: I have objected that that last  
11 answer was nonresponsive. I am entitled to ask the question.

12 MR. KIRKMAN: You are entitled to get an answer,  
13 and he's answered it five times.

14 Q Do you cite any literature in here that states that a  
15 coding scheme must be stated in a survey?

16 A The way you develop a survey is established in  
17 footnote five. The details are there. I do not cite every --  
18 I don't cite papers for every single element of every step of a  
19 procedure. It's common sense that if you have a bunch of text,  
20 to make it into numerical categories you have to tell me how  
21 you went from the words to numbers, and it's not done here.  
22 That's all I am saying.

23 Q If you have a Ph.D. who's writing a thesis and they  
24 make numerous assertions which are not supported by citations,  
25 would you consider that to be reliable?

1 Q Right.

2 A So essentially they're saying that those flights  
3 which exploit loopholes are going to be cheaper than the  
4 flights that don't.

5 Q So the flights on a Skiplagged's website will be  
6 cheaper than the flights on another website?

7 MR. KIRKMAN: Form. Asked and answered.

8 Q Is that what that is saying?

9 MR. KIRKMAN: Form.

10 A No. What it's saying as I read it is that it's  
11 saying, hey, our website shows you these hidden city tickets,  
12 if you want to think of it that way. Those prices are going --  
13 are not available in other websites. And those are going to be  
14 cheaper. It's going to save you money.

15 Q On Skiplagged?

16 MR. KIRKMAN: Form.

17 A On -- Yeah. They're talking about their site, yes.

18 Q Okay. And on the last -- Well, I think we have done  
19 that. Going on to page 24, the third paragraph down that  
20 starts with to sum up.

21 A Okay.

22 Q On the second sentence it says from my short testing  
23 I did not find that Skiplagged made any claim about expected  
24 price differences.

25 A Yes.

1           A     Hang on for a second. Let me just -- I have got  
2     Exhibit 2. Yes. Go ahead.

3           Q     So Dr. Wind -- Does Dr. Wind ask if -- in his  
4     experiments if the consumers believe American is affiliated  
5     with Skiplagged?

6           A     So on page 25 I reproduced the question number two  
7     that he asks after people see the -- the screenshots. And it  
8     says does the company that operates this website have a  
9     business connection or association with another company or do  
10    you not know.

11          Q     So yes, he does ask that?

12                   MR. KIRKMAN: Form.

13          A     That's the question he asks, yes.

14          Q     Okay. And you say there is a flaw in this. Correct?

15          A     Well, that's overly broad. What I basically say --  
16    My problem with the interpretation of the response is that I  
17    don't know what these words mean and what they -- how he,  
18    Professor Wind, proposes to define them. And I don't know how  
19    consumers define them. I -- I think it's pretty telling that  
20    the largest response is I don't know because they probably have  
21    no idea what these words mean.

22          Q     But the words business -- They don't know what the  
23    words business connection or association means?

24          A     So again, the problem is that it goes from that  
25    statement to these terms called as -- either as an authorized



1 travel agent or having some other direct relationship with  
2 American and -- or authorized buy. That's -- that's what he  
3 says in a summary. And it's a long way to go from the response  
4 to that question, open-ended I might add. I think -- I believe  
5 it was open-ended where the largest single response was don't  
6 know. Let me just back up for a second. I am not sure if  
7 that's open-ended or close-ended, but we do know that don't  
8 know is one of the responses. So that -- that's my response  
9 that these terms are not commonly known to consumers. So  
10 asking a question like this is -- is asking a very, you know,  
11 difficult question. And the answers that come back are going  
12 to reflect their lack of knowledge. Nothing more. Nothing  
13 less.

14 Q You -- Is the purpose of the survey to test  
15 consumers' perceptions on a given question?

16 MR. KIRKMAN: Form.

17 A All I know is the conclusion of the survey or the  
18 experiments is that it can -- and let me read. Skiplagged  
19 confuses consumers into believing that Skiplagged is associated  
20 with or authorized by American. And I leave off the stuff in  
21 parentheses. So confusion is part of it. A belief that is  
22 apparently inaccurate is part of it. And -- and the element  
23 that it's involved with, the belief and the confusion is about  
24 the nature of the relationship between between Amazon -- Amazon  
25 -- American and Skiplagged.

1 MS. PALNITKAR: Objection; nonresponsive.

2 Q I am asking you if you understand that the surveys --  
3 these questions are posed to test consumers' perceptions?

4 MR. KIRKMAN: Form.

5 A I don't know what the survey's purpose is. I do know  
6 what the conclusions are and what the stimulus is.

7 Q But when you're asking a question to a survey  
8 respondent does this -- does the company that operates this  
9 website have a business connection or association with another  
10 company or do you not know, this is testing what they believe.  
11 Correct? What the consumer believes, the respondent believes.

12 A It is trying to do that, but I don't think it does  
13 that.

14 Q But I am not asking if it's trying. I am saying is  
15 that what it's asking? It's asking for their perceptions.

16 MR. KIRKMAN: Form.

17 A I don't know what it's asking because I don't know  
18 what the responses mean. I don't know how they interpret this  
19 question. The question is so ambiguous about the association  
20 and business connection. I have no idea what those responses  
21 are. It's a poorly-worded question, and the responses tell me  
22 nothing about their beliefs other than they don't know.

23 Q So you're telling me you don't understand what this  
24 question means?

25 A Yes.

1 Q Several consumers understood it because they made a  
2 response.

3 A Please show me how they understood it.

4 Q It's all in Jerry Wind's report. You --

5 A If you can point one to me. I told you a minute ago  
6 I accept the don't know responses. That tells me something.  
7 And I point out it's unsurprising that the don't know response  
8 is the largest single category of response. The other  
9 responses are just a confused mess. They don't know what --  
10 what these responses -- They meaning Wind doesn't know what  
11 these responses mean because people don't know what business  
12 connection or association means.

13 Q So normal people don't know what association means?

14 A That's right. A business association, not an  
15 association between two people. These are business  
16 associations. They have no idea what their contract and  
17 obligation or agreements between any airline -- any of these  
18 websites is.

19 Q But you understand we are not asking them to evaluate  
20 a legal relationship. We are asking them if they believe there  
21 is an association between two businesses.

22 MR. KIRKMAN: Form.

23 A I can see what you're asking them, and I am telling  
24 you that you cannot interpret the responses because this is a  
25 very ambiguous question.

1           Q     It's ambiguous because the word association is not  
2     defined?

3           A     Because business connection and association are not  
4     terms that are available to an ordinary consumer, especially  
5     when it talks about the connection between two companies. They  
6     never see it. They don't see these documents. They don't know  
7     how it works. I couldn't tell you how Expedia makes its money.  
8     I would have to go find out from Expedia. And that's part of  
9     its business relationship with whoever they deal with.

10          Q     But this question isn't asking about how people --  
11     how businesses make their money. They are asking if there is a  
12     connection between two businesses. And you are saying  
13     that's -- that's something that's over the heads of a normal  
14     consumer?

15          A     No. It's not over the heads. You are going to get a  
16     variety of interpretations. That's what I am saying. It's an  
17     ambiguous question.

18          Q     And is that what -- Okay. And is that what the  
19     survey was trying to find out is what their interpretations  
20     were?

21                     MR. KIRKMAN: Form.

22          A     I don't think so. I don't think we would interpret a  
23     business connection as what a customer thinks. I think  
24     business connection is an objective thing that can be  
25     ascertained by looking in the documents.

1           Q     The last line. There is no data in the Wind report  
2     that customers' lack of knowledge about the AA Skiplagged.com  
3     business relationship has any negative impact on customers. Do  
4     you still believe that sentence to be true?

5           A     Absolutely.

6           Q     Why?

7           A     I mean there's -- there's the lack of data. That's  
8     number one. There's no data in the report that any negative  
9     impact is arising from their lack of knowledge. So you have  
10    two consents there, lack of knowledge and negative impact. I  
11    see no data actually on either one. So there's no way you can  
12    make a conclusion about a negative impact. I write that  
13    statement because normally generally if I don't know about  
14    something, I usually have a modest expectation or maybe even a  
15    negative expectation about a company I have never heard about,  
16    about a product I have never seen, those kinds of things. So  
17    it's useful and very important to show that in fact that --  
18    that the negative view I have of a company can be traced to my  
19    lack of knowledge of it. That's -- that's a very common  
20    business problem. I don't see any of that, any data speaking  
21    to that here.

22          Q     Do you think that if a consumer thought -- or let me  
23     scratch that. If you thought that American Airlines and  
24     Skiplagged had a business relationship, would you believe that  
25     a ticket you bought on Skiplagged would be valid?

1 MR. KIRKMAN: Form.

2 A I think that's an overreach. I don't think you  
3 can -- you can go to it's valid from a connection. I think  
4 it's a lot more complicated than that. It's the question of my  
5 expectation that the ticket is valid because it's, you know,  
6 the credit card is charged by American Airlines. There are  
7 many many elements that go into it. So I would be hard-pressed  
8 to say that I can conclude that something is valid or not  
9 valid, a binary outcome based on whether somebody has a  
10 business relationship or not a business relationship.

11 Q Is it possible that someone would think the ticket  
12 they are buying on Skiplagged is valid?

13 A Of course.

14 Q Is it possible to think that someone would think a  
15 ticket they're buying on Skiplagged is valid because Skiplagged  
16 and American have a business relationship together?

17 MR. KIRKMAN: Form.

18 A Anything is possible. I just don't see any evidence  
19 that the lack of knowledge which I -- which I infer from the  
20 don't know being the most common response has anything to do  
21 with their undisclosed negative effects on their -- on their  
22 customers. I don't see any evidence of any of this stuff. So  
23 all I am saying here is that there's no evidence of a negative  
24 impact on consumers. There's no evidence of lack of knowledge  
25 leading to the negative impact. And that's -- that's all I am

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1 saying.

2 Q Okay. Let's go to page 26. Under number two, the  
3 second paragraph that starts with in sum, do you see that?

4 A Yes.

5 Q I will read it to you. In sum, comma, regardless of  
6 whether customers are aware of the exact contractual details  
7 between Skiplagged.com and American Airlines, comma, there is  
8 no evidence that Skiplagged is deceptively creating consumer  
9 confusion about the conditions of hidden city travel, period.  
10 Do you still believe that sentence to be true?

11 A Yes.

12 Q Did you read the complaints, any of the content of  
13 the various complaints that have been sent to Skiplagged.com?

14 A I have glanced at some of those things, the  
15 illustrative examples he provides. I have not gone through  
16 the -- the 88 complaints or however many there were in any --  
17 any detail.

18 Q The 12,000 complaints produced by Skiplagged?

19 A If there are 12,000.

20 MR. KIRKMAN: Wait. Let her finish. Form.

21 Q There were 12,000 complaints produced by Skiplagged  
22 in this case that Skiplagged received from customers. Did you  
23 have access to any of those?

24 A I believe there were 12,000 e-mails coded as  
25 complaints. I have no idea how they were coded. Those are --

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1     So I would have -- I don't -- I don't know the details of how  
2     those data were produced or calculated to be 12,000. What the  
3     coding scheme -- Again, we come back to coding scheme. So I  
4     don't have any opinion on that.

5           Q     That data was produced by Skiplagged.com as -- when  
6     we asked them for their customer complaints.

7           A     And I have had no contact with Skiplagged.com. So I  
8     can't vouch for what they have produced to you.

9           Q     Okay. So you -- you can't say that there's no  
10    evidence that Skiplagged is deceptively creating customer  
11    confusion because you haven't seen the customer complaints,  
12    have you?

13          A     I've --

14                   MR. KIRKMAN: Form.

15                   THE WITNESS: Sorry.

16          A     I have seen the illustrative examples cited in the  
17    Wind report, and I have seen the data produced saying that  
18    there's 12,000 complaints. And I see no evidence that those  
19    are connected to consumer confusion that -- created by  
20    deception on Skiplagged's part. That's what I'm saying.

21          Q     Because you haven't read those 12,000 complaints, you  
22    don't know that there's evidence or not. Right?

23          A     Reading those complaints would not improve or change  
24    my opinion in this matter. You have to do an analysis of who  
25    was complaining about deception and whether in fact they



1 were -- they were confused and what the source of deception  
2 was. There's a lot of -- There's a lot of links there in that  
3 causal chain. And without investigating each link in the  
4 causal chain, I am not going to change my opinion that there is  
5 no evidence.

6 Q So you are saying there's no evidence because you  
7 haven't done the analysis?

8 MR. KIRKMAN: Form.

9 A No. There's no evidence because none has been  
10 presented to me, and I was -- I have told you several times I  
11 have done -- produced no data or looked at any data and done  
12 any data analysis on my own.

13 Q Because it wasn't presented to you?

14 MR. KIRKMAN: Form.

15 Q And that's why there's no evidence. Correct?

16 MR. KIRKMAN: Form. Form.

17 A There is no evidence in the Wind report to start  
18 with, which is the bulk of what I am relying on. And there's  
19 no evidence in the complaint data that is also contained in the  
20 Wind report that such a conclusion that there is evidence  
21 connecting consumer confusion about hidden city travel to  
22 deception on the part of Skiplagged. That's what I am saying.

23 MS. PALNITKAR: I will pass the witness.

24 MR. KIRKMAN: We shall reserve our questions  
25 until the time of trial.



1 I, GEORGE JOHN, PhD, have read the foregoing deposition  
2 and hereby affix my signature that same is true and correct,  
3 except as noted above.

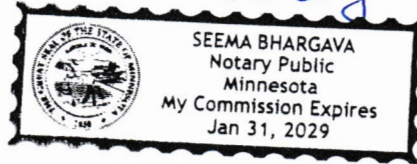
4 *George John*  
5

GEORGE JOHN, PhD

6 *Seema Bhargava*

7 THE STATE OF MN \*

\*



8 THE COUNTY OF Hennepin \*

9 BEFORE ME *George John*, on this day

10 personally appeared GEORGE JOHN, PhD, known to be (or proved  
11 to me under oath or through MN Drivers Lic )

12 (description of identity card or other document) to be the  
13 person whose name is subscribed to the foregoing instrument and  
14 acknowledged to me that they executed the same for the purposes  
15 and consideration therein expressed.

16 GIVEN UNDER MY HAND AND SEAL OF OFFICE this 10<sup>th</sup>  
17 day of August, 2024.

18 *Seema Bhargava*  
19

NOTARY PUBLIC IN AND FOR

20 THE STATE OF MINNESOTA  
21  
22  
23  
24  
25

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

AMERICAN AIRLINES, INC., )  
Plaintiff, )  
)  
)  
V. ) Civil Action No. 4:23-cv-00860-P  
)  
)  
SKIPLAGGED, INC., )  
Defendant. )

REPORTER'S CERTIFICATION  
DEPOSITION OF GEORGE JOHN, PhD  
TAKEN ON JULY 9, 2024

I, RHONDA JACKS, Certified Shorthand Reporter in and for  
the State of Texas, certify to the following:

That the witness, GEORGE JOHN, PhD, was duly sworn by the  
officer and that the transcript of the oral deposition is a  
true record of the testimony given by the witness;

That the amount of time used by each party at the  
deposition is as follows:

MS. BINA PALNITKAR, 4 hours, 35 minutes.

MR. WILLIAM KIRKMAN, 0 hours, 0 minutes.

Page 221

1 That pursuant to the information made available to me at  
2 the time said deposition was taken, the following includes all  
3 parties of record:

4 MS. BINA PALNITKAR, Attorney for the Plaintiff

5 MR. WILLIAM KIRKMAN, Attorney for the Defendant

6 That before the conclusion of the deposition, the witness,  
7 GEORGE JOHN, PhD, did request a review of this transcript  
8 pursuant to Rule 30(e)(1).

9 I further certify that I am neither counsel for,  
10 related to, nor employed by any of the parties or attorneys in  
11 the action in which this proceeding was taken, and further that  
12 I am not financially or otherwise interested in the outcome of  
13 the action.

14  
15 Certified to by me, this 15th day of July, 2024.

16  
17  
18 

19  
20  
21 RHONDA JACKS, CSR #3665

Expiration Date: 10-31-2025

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Page 222

1 William L. Kirkman - billk@kirkmanlawfirm.com

2 July 15, 2024

3 RE: American Airlines, Inc. v. Skiplagged, Inc

4 DEPOSITION OF: George John , PhD (# 6791874)

5 The above-referenced witness transcript is  
6 available for read and sign.

7 Within the applicable timeframe, the witness  
8 should read the testimony to verify its accuracy. If  
9 there are any changes, the witness should note those  
10 on the attached Errata Sheet.

11 The witness should sign and notarize the  
12 attached Errata pages and return to Veritext at  
13 errata-tx@veritext.com.

14 According to applicable rules or agreements, if  
15 the witness fails to do so within the time allotted,  
16 a certified copy of the transcript may be used as if  
17 signed.

18 Yours,

19 Veritext Legal Solutions  
20  
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22  
23  
24  
25

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